77-643
No.

FILED
NOV 2 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI

AND

RAY MARSHALL, *Secretary of Labor.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BERNARD KLEIMAN
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Gottesman, Cohen
& Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JAMES D. ENGLISH
CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioner

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

- I. The Statutory Preclusion Issue 14
- II. The "Common Benefit" Issue 28
  - (1) Equitable Assessment 32
  - (2) Unjust Enrichment 38

CONCLUSION

Appendices:

A. Opinion of the Court of Appeals, dated April 20, 1977 .... 1a

B. Order of the Court of Appeals, dated June 3, 1977. 53a

C. Memorandum and Order of the District Court, dated December 11, 1975 .... 55a

D. Magistrate's Report and Recommendations, dated July 22, 1975 .... 60a

E. Order of the Court of Appeals "Sur Petition for Rehearing," dated July 5, 1977 .... 74a

F. Order Extending Time To File Petition For Writ of Certiorari, dated September 23, 1977 .... 76a

TABLE OF AUTHORITIES

Cases:

Page

Alyeska Pipeline Co. v. *Wildnerness Society,* 421 U.S. 240 (1975) 12, 13, 28-33, 38-40

Calhoon v. *Harvey,* 379 U.S. 134 (1964) 15, 36

City of Detroit v. *Grinnell Corp.,* 495 F.2d 448 (2nd Cir. 1974) 8, 25

Dunlop v. *Bachowski,* 421 U.S. 560 (1975) 15

F. D. Rich Co. v. *Industrial Lumber Co.,* 417 U.S. 116 (1974) 24

Fleischmann v. *Maier Brewing,* 386 U.S. 714 (1967). 14, 17, 19-20

Hall v. *Cole,* 412 U.S. 1 (1973) 14, 16, 17, 19-22, 32-35, 38

Hodgson v. *Steelworkers,* 403 U.S. 333 (1971) 21

Lindy Brothers Builders, Inc. of Philadelphia v. *American Radiator and Standard Sanitary Corp.,* 487 F.2d 161 (3rd Cir. 1973) 7-8, 25

Lindy Brothers Builders, Inc. v. *American Radiator and Standard Sanitary Corp.,* 540 F.2d 102 (3rd Cir. 1976) 24

McDonald v. *Oliver,* 525 F.2d 1217 (5th Cir. 1976) .. 14, 39-40

Merola v. *Atlantic Richfield Co.,* 515 F.2d 165 (3rd Cir. 1975) 24

Mills v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1973) .. 17, 19, 38

Trbovich v. *United Mine Workers,* 404 U.S. 528 (1972) 2, 10, 13, 15, 17-19, 22-23, 27-28, 31, 33, 38

Page

Usery v. *Local 639, International Brotherhood of Teamsters, Etc.,* 543 F.2d 369 (D.C. Cir. 1976), *cert. denied sub nom., Iocal Union No. 639* v. *Marshall,* —— U.S. ——, 97 S. Ct. 1159, 51 L.Ed 2nd 573 (1977) .. 13, 17, 19, 22

Wirtz v. *Bottle Blowers Assn.,* 389 U.S. 463 (1968) 15

Wirtz v. *Laborers' Union,* 389 U.S. 477 (1968) 21

Statutory Provisions

United States Code:

Judiciary Code, 28 U.S.C. § 1254(1) 2

Labor Management Reporting and Disclosure Act of 1959:

- Section 101, 29 U.S.C. § 411 .... 21, 32
- Section 102, 20 U.S.C. § 412 .... 16, 20
- Section 201(c), 29 U.S.C. § 431(c) 16
- Section 304(a), 29 U.S.C. § 464(a) 16
- Section 402, 29 U.S.C. § 482 .... 3-5, 14, 15
- Section 403, 29 U.S.C. § 483 .... 5, 14, 15
- Section 501(b), 29 U.S.C. § 501(b) 16

SUPREME COURT OF THE
UNITED STATES

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI

AND

RAY MARSHALL, *Secretary of Labor.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

Petitioner United Steelworkers of America, AFL-CIO-CLC (hereinafter "petitioner" or "USWA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on April 20, 1977.

OPINIONS BELOW

The opinion of the court of appeals is reported at 554 F.2d 586 and is reprinted as Appendix A. A supplementary opinion by that court, issued in conjunction with the denial of petitioner's motion for leave to file a petition for rehearing in excess of fifteen pages, is unreported and appears as Appendix B. The opinion of the district court, and the opinion of the magistrate which was adopted by the district court, are unreported and appear as Appendices C and D respectively.

JURISDICTION

The Court of Appeals' opinion issued on April 20, 1977. A timely petition for rehearing was denied on July 5, 1977 (Appendix E). On September 23, 1977, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 2, 1977 (Appendix F). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a losing candidate in a union election who intervenes (in the limited fashion permitted by *Trbovich* v. *United Mine Workers*) in an action brought by the Secretary of Labor challenging that election under Title IV of the LMRDA, may secure a "common benefit" attorneys' fee award against the union's treasury, or whether such an award is inconsistent with, and therefore precluded by, the enforcement scheme of Title IV.

2. Whether a court of appeals, believing that private enforcement is integral to a statute's effectiveness, may, in the absence of statutory authority to award fees, utilize the "common benefit" theory to stimulate private enforcement, despite the courts' acknowledgement that most of the persons to be charged with the fee have not received a benefit of similar nature or value to that received by the intervenor and by a small minority of those to be charged, and despite the fact that those to be charged with the fee have not unjustly been enriched by the intervenor's efforts. Specifically, in this case:

a. In a Title IV action challenging an election in a union district containing 9% of the union's members, where the only allegations of misconduct in the Secretary's complaint concern actions of persons within that district, and the only relief obtained is a re-run of the challenged election in that district, did the court of appeals err in holding that the "common benefit" exception could justify an attorneys' fee award to an intervening candidate against all the union's members throughout the United States and Canada?

b. Where Congress has entrusted to the Secretary the exclusive responsibility for representing the interests of all union members in Title IV actions, can a benefit conferred upon those members by an intervenor in such an action constitute "*unjust* enrichment" of those members as would be required for a "common benefit" award against them?

STATUTORY PROVISIONS INVOLVED

Section 402 of the LMRDA, 29 U.S.C. § 482, provides:

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organi-

> zation shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.
>
> (c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> (1) that an election has not been held within the time prescribed by section 401 of this title, or
>
> (2) that the violation of section 401 of this title may have affected the outcome of an election,
>
> the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such

> persons have been removed as officers of the labor organization.
>
> (d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Section 403 of the LMRDA, 29 U.S.C. § 483, provides in pertinent part:

> * * * * The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

STATEMENT OF THE CASE

Under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA") only the Secretary of Labor may bring a civil action to set aside the results of an election of union officers. In November of 1973, the Secretary brought such a suit against petitioner (hereinafter "the union"), alleging certain improprieties in the conduct of an election for District Director of the union's District 31, which spans portions of Illinois and Indiana. The Secretary's complaint alleged no improprieties by the union's national officers; all alleged misconduct was stated to have been committed by persons within District 31. The complaint sought to have this District 31 election declared null and void and to have the court direct "a new election for District Director of District 31 under the supervision of the [Secretary]."

Respondent Sadlowski, who had been the losing candidate in the District 31 election, intervened in the suit, filing a complaint which, given the limitations imposed by law on the role of an intervenor in a Title IV case (see pp. 22-23, *infra*), added no substantive allegations to those made in the Secretary's complaint, but which requested eight items of relief additional to that requested by the Secretary.

This suit was ultimately concluded when a settlement agreement was negotiated between the Secretary and the union—neither Sadlowski nor his attorneys participated in these negotiations. Indeed, Sadlowski filed an opposition to the motion of the Secretary and the union to have the settlement approved. Notwithstanding this opposition, the district court, after a hearing, approved the settlement agreement and entered the order proposed by the Secretary and the union.

The settlement agreement as approved by the district court expressly stated that "neither the Secretary nor the Union concedes the validity of the claims of the other." The court's order contained no finding of liability. The order simply directed that a new election, under the supervision of the Secretary, be held for the office of Director of District 31; the order had no application to any other election for any other office in the union. The order included *none* of the additional relief requested in Sadlowski's complaint.

Pursuant to the order so entered, a new election was run in District 31 under the supervision of the Secretary, Sadlowski was elected and then installed as Director of District 31. Thereafter, Sadlowski's attorneys returned to the district court and filed an application seeking attorneys fees approximating $500,000. The application contained forty pages of factual allegations respecting the role Sadlowski's four attorneys had played in their asserted 1,785 hours of attorneys' time, and the claimed achievements from such efforts. In essence, the major theme of the allegations was that the Labor Department had performed poorly in a number of respects and would not have obtained a new election, much less a fair new election, in

District 31 but for the efforts and prodding of Sadlowski's attorneys. As District 31 does not have a treasury of its own, there was no way for the attorneys to seek a "common benefit" award payable only by members in District 31. Accordingly, they claimed to have conferred a benefit on all the members of the union and sought a "common benefit" award from the union's treasury containing the dues of all the union's members throughout the United States and Canada.

The union, stating that it "does not concede the truth of the factual assertions in the application," filed a motion to dismiss the application on its face for failure, as a matter of law to state a valid claim for attorneys' fees. Two independent legal grounds were cited as the basis for this motion: (1) an award of attorneys' fees would be inconsistent with, and therefore is precluded by, the exclusive remedial scheme of Title IV of LMRDA, and (2) even assuming *arguendo* that the award were not barred by statute, the assertions of Sadlowski's counsel did not state a proper claim against the union's treasury under the "common-benefit" theory.

In its motion, USWA made clear that the application with its forty pages of factual assertions raised numerous factual issues which would require "massive discovery and an evidentiary hearing," and therefore requested that discovery not be commenced pending disposition of the motion. In an accompanying memorandum, USWA elaborated:

> "Should the Court deny this motion to dismiss, USWA wishes to make clear that it does not concede the truth of the factual assertions in the application. Denial of the instant motion would leave extant factual issues requiring extensive discovery and ultimately an evidentiary hearing. See, *Lindy Bros. Builders Inc. of Phila.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d

> 161-170 (3rd Cir. 1973); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 471-472 (2d Cir. 1974). Accordingly, since resolution of this motion may be dispositive, USWA suggests that discovery not be commenced until the Court decides whether to dismiss the application for attorneys' fees on its face."

The Secretary also filed a response to the application for attorneys' fees in which, while taking no position as to the legal availability of the relief sought by the application, he replied to the application's "express and implied criticism of the Secretary's role in the conduct of the litigation and the supervision of the ensuing election. . . ." The Secretary's response stated, *inter alia*, the following:

> "Without attempting to detract from the efforts of counsel for intervenor, it must be pointed out that it is quite customary for the Department's investigators to receive assistance from the complainant in the conduct of their investigation of an election, even when the complainant is not represented by an attorney. Indeed it is self-evident that the major part of the leads pursued by the investigators in such an investigation derive from the complainant's allegations. However, the Department pursues its own investigation to obtain evidence which may or may not substantiate those allegations. In this case, the Department spent approximately 3,600 man hours in the investigation of Sadlowski's complaint.
>
> "After the filing of the suit, the government's attorneys promptly instituted discovery and moved for expedition of the proceedings. The government was prepared to proceed to trial without the additional evidence sought by counsel for intervenor through his depositions. The Stipulation of Settlement was negotiated by the government and approved in accordance with the agreement of the principal parties.
>
> "The supervision of the election was the responsibility of the Department of Labor. The Department utilized the expertise gained through the supervision of hundreds of elections during the fifteen years of the Act's existence. The Department expended approximately 25,000 man hours in connection with its supervisory role.
>
> "In short, the Department of Labor has conscientiously fulfilled its responsibilities with respect to the investigation of Sadlowski's complaint, the successful prosecution of the litigation, and the supervision of the ensuing election in such a manner as to insure the free operation of the democratic process."

The district court referred the union's motion to dismiss to a United States Magistrate who issued a Report and Recommendation finding as a matter of law (1) that the award sought contravened the purposes of, and thus was precluded by, the statutory scheme of Title IV, and (2) that, in any case, the application did not make out a proper claim for attorneys' fees under the common benefit doctrine, for 91% of the fee would be paid by members who had no stake in the District 31 election. Therefore, the magistrate recommended that the union's motion to dismiss be granted, and that the application for attorneys' fees be denied as a matter of law. (App. D). The district court issued a memorandum in which, *inter alia*, it adopted the Report and Recommendation of the magistrate. (App. C). The application for attorneys' fees was thus denied by the district court.

On appeal to the Third Circuit, a divided panel reversed the decision of the district court. The panel majority ruled that the district court had been wrong on both legal grounds. As to the issue whether the scheme of Title VII precludes a common-benefit fee award from the defendant union's treasury to an intervening candidate, the majority reasoned, in essence, as follows: the Supreme Court in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), reconstructed the enforcement scheme of Title IV to create a role for a private intervenor in Title IV actions as the only true "adversary to the union in developing the facts and the legal issues"; to hold that the statute precludes an award of fees to such an intervenor would mean that the "Supreme Court intended to create" an "empty . . . role"; and, "courts and legislatures do not ordinarily create roles—strong roles—and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively." (App. 20a-21a).

As to the issue whether the prerequisites of the "common-benefit" exception could be satisfied here, the majority found that, even though the Secretary's complaint had alleged no misconduct by the union's national officers or by anyone outside of District 31, the membership of the union outside of District 31 benefited from Sadlowski's attorneys' alleged achievements in the lawsuit because "it would be naive to assume that similar election 'irregularities' have not or would not spread to other districts and locals. . . ." (App. 33a). [The court did not explain how the disposition of the instant case—a rerun of the District 31 election, with no injunctive effect elsewhere—furthered the interests of members outside District 31 even on its 'non-naive' assumption that violations would occur elsewhere]. Further, the court noted that one of a district director's functions, albeit not the "main function," is to serve on the union's International Executive Board. Since this Board is charged with certain functions to be performed on the behalf of the entire membership of the union, "[i]nterference with the election of the District 31 director cannot be said to have a merely localized impact on the union membership." (App. 34a). The majority conceded that these asserted benefits to members outside of District 31 are not as "great" as the benefit to those within the District, but went on to explain why nevertheless the "common-benefit" exception must be found applicable (App. 35a-36a):

> "The position that the USWA treasury is an improper fund from which to make an award, since the primary benefit was to District 31, fails . . . While it cannot be denied that the *greatest* benefit was conferred upon Union members in that district, we note that suit was brought against the USWA, rather than District 31, precisely because districts are not labor organizations within the meaning of 29 U.S.C. § 402(i), and the parent union is the suable entity. There is, moreover, no district treasury, since all dues and fees are contributed directly to the USWA and later some funds are dispersed to the districts. To hold that attorney's fees must be recovered from a fund created by those who received the greatest benefit, rather than from a fund created by those who received a legally sufficient and significant benefit, would be tantamount to denial of that recovery. But more than that, such a holding would effectively allow unions to insulate themselves from union members' attempts to prosecute Title IV violations. By creating an internal structure that commingles funds and denies their identifiability to an individual unit, unions could preclude recovery of attorney's fees. Such action would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich*."

Judge Aldisert dissented from the ruling of the majority on both legal issues, declaring that (1) common benefit awards are precluded by the enforcement scheme of Title IV and (2) an award against all the union's members does not fit the "common benefit" rationale as set forth in *Alyeska Pipeline Service* v. *Wilderness Society,* 412 U.S. 240 (1975) (App. 44a-52a).[1]

REASONS FOR GRANTING THE WRIT

As we show herein, the majority of the court below has determined two issues of broad importance in a manner directly inconsistent with controlling decisions of this Court.

First, in *Trbovich* v. *United Mine Workers, supra,* this Court, in order to secure the integrity of the enforcement scheme of Title IV of the LMRDA, set forth with great care the limitations on the role an intervenor may play in a Title IV action. As we show in part I, the majority below—ironically founding its analysis upon *Trbovich*—has expanded the role of a Title IV intervenor beyond those limitations and brought into jeopardy the congressional purposes that the *Trbovich* Court sought to protect. The District of Columbia Circuit reached the same result in *Usery* v. *Local 639 International Brotherhood of Teamsters, Etc.* 543 F.2d 369 (D.C. Cir. 1976) (hereinafter "*Local 639*"), *cert. denied sub nom., Local Union No. 639* v. *Marshall,* — U.S. —, 97 S. Ct. 1159, 51 L.Ed 2nd 573 (1977). If the instant case is left to stand without further review, it will, together with *Local 639*, become the operative precedent in this important statutory area in derogation of the principles this Court sought to establish in *Trbovich.*

Second, in *Alyeska Pipeline Service* v. *Wilderness Society, supra,* the Court, in setting forth the general rule in this country against fee shifting, gave precise definition to the "common benefit" exception to that rule to assure that the exception would not overwhelm the rule. As we show in part II, the majority below, by loosing the common benefit exception from its logic, has in effect merely approved under another name the "private attorney general" exception rejected in *Alyeska.* Again, if the decision below goes unreviewed, an important precedent will have been established in contravention of the principles articulated in *Alyeska.* As we further show in part II, in a critical respect this aspect of the court's decision is in apparent conflict with the decision of the Fifth Circuit in *McDonald* v. *Oliver*, 525 F.2d 1217, 1228 (5th Cir. 1976).

---

[1] Because the district court granted the union's motion to dismiss as a matter of law, the factual assertions in the application for attorneys' fees have never been litigated. Nevertheless, portions of the majority's opinion read as though said allegations had been proven and found as fact by a trier of fact. As the dissent put it (App. 50a),

> "Although such rhetoric is usually associated with partisan politics, these are not excerpts from political campaign literature. These are statements from an opinion of this court. But they do not derive from the findings of any trial court. They are conclusions drawn by the majority on the basis of certain averments set forth in an application for attorneys' fees. . . . That such facts are assumed for the purpose of testing a legal issue does not permit a court to draw from them, as did the majority, additional nonfactual conclusions, e.g., 'vindication of democratic process in USWA elections,' 'the particularly egregious abuses of the electoral process in this case,' and 'union democracy would have been a hollow promise without Sadlowski's involvement.' As a member of this court, I am constrained to specifically disassociate myself from this extravagant language and from any resulting inferences which tend to impugn the integrity of the International President and members of the Executive Board of the Steelworkers' Union."

The majority's opinion begins with a statement that it is assuming the truth of the allegations only for the purpose of adjudicating the propriety of the granting of a motion to dismiss (App. 2a), and it reiterated this statement in a preliminary ruling on the petition for rehearing (App. 54a, n. 1).

I. *The Statutory Preclusion Issue*

This Court has repeatedly held that the "common benefit" exception may not be applied in a statutory cause of action where an award of attorneys' fees would not be consistent with the remedial scheme established by Congress. *Fleischmann* v. *Maier Brewing*, 386 U.S. 714, 719-721 (1967); *Hall* v. *Cole*, 412 U.S. 1, 9-19 (1973). In *Fleischmann*, the standard was stated as follows:

> "The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. . . . When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. . . . We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context."

386 U.S. at 719-721.

The post-election remedial scheme established by Title IV is comprehensive, and Congress has declared it to be "exclusive." Pursuant to that scheme *only* the Secretary has the power to bring a post-election challenge suit. 29 U.S.C. § 482, 483. By design, Congress prohibited private litigants from initiating a lawsuit to challenge a completed election.[2] That prohibition resulted from a congressional concern that, otherwise, courts could be used, particularly by defeated candidates, to meddle in the internal affairs of union government, and unions would be vulnerable to the harassment and expense incident to defending against such private litigation. *Trbovich* v. *United Mine Workers of America, supra*, 404 U.S. at 530-537; *Dunlop* v. *Bachowski*, 421 U.S. 560, 568-570 (1975); *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 470-472 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

Further, Congress specified precisely the relief that may be obtained from a Title IV post-election suit brought by the Secretary (29 U.S.C. § 482(c)):

> "The court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization."

This statutory remedy is comprehensive in its terms. The remedy is public in nature; no private or individual relief is provided. And, in 29 U.S.C. § 483, Congress declared that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive."

Lest there be any doubt that Congress meant what it said in Title IV, it should be observed that the remedial provisions of that Title stand in marked contrast to those of the other titles of the LMRDA. Thus, all titles of the LMRDA except Title IV reflect a congressional determination to rely upon individual union members to bring private suits to enforce substantive rights intended not only to benefit the actual litigant but also for the protection of the general union membership. Further, all titles of the LMDRA except Title IV either expressly authorize an award of attorneys' fees or, with the language "such relief (including injunctions) as may be appropriate," give courts a "broad mandate" to exercise general equitable powers, thereby permitting an award of attorneys' fees justified by an equitable exception such as the common-benefit doctrine. See, *Hall* v. *Cole*, *supra*, 412 U.S. at 11.[3]

---

[2] As the court below acknowledged (App. 6a):

> "* * * Congress rejected a bill, H.R. 8342, 86th Cong., 1st Sess § 402(a) (1959), which provided for union members suits under Title IV, and authorized the award of appropriate relief, including attorney's fees."

In the face of this statutory scheme, which manifests a clear congressional intent to preclude private suits and private remedies in the post-election enforcement processes of Title IV, the majority below nevertheless found that Congress did not intend to preclude a private intervenor from obtaining an award of attorneys' fees in a Title IV action. The analysis by which the court below reached that result—and the analysis by which the District of Columbia Circuit in *Local 639* reached the same result—is in two steps. First, the court found that the *Fleischmann* standard, quoted above, is no longer applicable: "the analytical method embraced by *Fleischmann* was substantially undercut by later Supreme Court decisions." (App 7a). Rather, the court concluded, in more recent cases—*Hall* v. *Cole*, *supra* and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1973)—the Supreme Court has "enunciated a presumption against preclusion" (*id*). Second, applying this presumption, the court below looked not to the language or the legislative history of Title IV, where it could find no comfort, but to what it called Supreme Court "supplement[s]" to and "expansion" of the structure of Title IV. (App. 9a-10a). Thus, the majority stated (App. 10a):

> "The fact that the Supreme Court has found it necessary to supplement the structure of Title IV on two occasions suggests that the guidelines of *Hall* . . . have been met by the facts of this case."

In this regard, the majority relied primarily on *Trbovich*, finding that this Court would not have "created" the "strong role" of an intervenor in Title IV actions and then "deny [its] existence by refusing to recognize the existence of the means [attorneys' fees] to fulfill [it] effectively." (App. 21a). Indeed, the majority read *Trbovich* as transforming the statutory scheme so that the primary adversary role in a Title IV action is now to be played by the private intervenor and not the Secretary (App. 20a-21a):

> "The Department of Labor performs a quasi-judicial, rather than a purely adversarial role in Title IV cases. Its duty is to the public, its own

---

[3] In Title I (bill of rights of union members), Congress relied for enforcement upon civil suits brought by individual union members "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412. In Title II (reporting), Congress also relied upon union members for enforcement, and expressly provided that: "The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 431(c). In Title III (union trusteeships), Congress again created for individual union members a civil cause of action "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 464(a). In Title V (fiduciary responsibility of union officers), Congress not only gave union members a right to bring suit, after exhaustion of internal union remedies, for "damages . . . an accounting or other appropriate relief," but in addition specified that attorneys fees and expenses may be allotted as part of that relief, 29 U.S.C. § 501(b). When it came to Title IV, Congress expressly rejected proposals that would have established a private enforcement mechanism with attorneys' fees available. See note 2, *supra*.

policies, the union interest, and the individual. In deciding whether to institute suit, what to complain of, and what to settle for, the Secretary must constantly weigh competing interests and duties. Before the *Trbovich*-intervenor existed, the statutory scheme involved only one party truly comporting itself in an adversarial posture: the union. But since *Trbovich* the "union interest" is defined by two parties with adverse viewpoints—even if their interest in the union remains a common denominator. The Secretary, in this circumstance, occupies a more tenable position since he has not only his own expertise in the field, but, in addition, the benefit of the crystallization and presentation of issues and viewpoints we associate with the adversary process. The intervenor's role created by *Trbovich* is thus that of an adversary to the union in developing the facts and the legal issues. What the issue of statutory preclusion of the exercise of equitable powers boils down to in this context is the question of how empty a role the Supreme Court intended to create. Considering the complexities of internal union remedies, complaint to the Secretary, and recourse to the courts, and the penalties for lack of legal or technical sophistication, we cannot believe that intervenors were intended to proceed *pro se*. To have anticipated the depth and quality of involvement, expertise, and enterprise shown by Despres, Rauh, Yablonski and Schneider for a fee which the USWA would have the courts find themselves powerless to award would be to deny *Trbovich* all effect. While we do not consider the propriety of an award of attorney's fees for union member assistance in pursuing Title IV violations where suit is not brought or the complainant does not intervene, we note that courts and legislatures do

not ordinarily create roles—strong roles—and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively."

Thus, the majority read *Trbovich* to have reconstituted Title IV, making its enforcement scheme nearly of the same character as the other titles of LMRDA—save for the bothersome detail that only the Secretary can bring a Title IV suit—and therefore making a private award of attorneys' fees appropriate in a Title IV action. In the words of the *Local 639* court, quoted by the majority below, App. 10a,

> "notwithstanding the absence of a broad relief provision in section 402, the court in a Title IV action faces the same task as if it were adjudicating a union member suit under the other titles—to grant relief according to the necessities of the case, i.e. to fashion 'appropriate' relief."

As to the first step in the majority's analysis, we doubt that the Court in *Mills* or *Hall* intended to change the standard enunciated in *Fleishmann*.[4] But whether or not the *Fleischmann* standard has been altered, if

---

[4] The Supreme Court in *Fleishmann* stated, "[w]hen a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." 386 U.S. at 720. Neither *Mills* nor *Hall* expressly repudiates this proposition. Rather, in each case, the Court purports to apply the *Fleischmann* analysis to the facts before it. We see no evidence of a "presumption against preclusion" in either case, but instead an inquiry as to whether importation of the remedy of attorneys' fees is *consistent* with the applicable statutory scheme—the inquiry which we understand *Fleischmann* to mandate. The majority below predicates its analysis on bits and pieces of language taken out of context from *Hall*, which it reads to suggest a departure from *Fleishmann*. A more pertinent reference to the language of *Hall* is at the point where the Supreme Court states the holding on this issue:

> "We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is *consistent with* . . . the Act. . . ."

---

412 U.S. at 4 (emphasis added). In any event, more important than the language chosen is the analysis actually applied. In this regard, it is important to note that the factors on which the *Hall* Court relied to find no statutory bar to a fee award in a Title I action are not present here.

First, the *Hall* Court looked to the remedial language of Title I which, rather than precluding judicial flexibility as to remedy, authorizes courts to grant "such relief . . . as may be appropriate." 29 U.S.C. § 412. This language was critical to the Court's decision:

> "Unlike § 35 of the Lanham Act, which specifically 'provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled,' § 102 of the LMRDA broadly authorizes the courts to grant 'such relief (including injunctions) as may be appropriate.' 29 U.S.C. § 412. Thus, § 102 does not 'meticulously detail the remedies available to a plaintiff,' and we cannot fairly infer from the language of that provision an intent to deny to the courts the traditional equitable power to grant counsel fees in 'appropriate' situations.
>
> ". . . § 102 [29 U.S.C. § 412] was premised upon the fact that Title I litigation necessarily demands that remedies 'be tailored to fit facts and circumstances admitting of almost infinite variety,' and § 102 was therefore cast as a broad mandate to the courts to fashion 'appropriate' relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the 'danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to "grant relief according to the necessities of the case." ' "

412 U.S. at 10-11. As we have seen, there is no such "broad mandate" in the post-election remedial provisions of Title IV; indeed, the contrary congressional intent is evidenced by the fact that Congress did "spell out all of the remedies available" under the post-election challenge provisions of Title IV.

Second, the Court in *Hall* was careful to show that the availability of an award of attorneys' fees was consistent with the enforcement scheme of Title I, which depends on lawsuits brought by private litigants:

the language and history of Title IV are properly

> ". . . [T]he award of attorneys' fees under § 102 is clearly consonant with Congress' express desire to adopt 'legislation that will afford necessary protection of the rights and interests of employees and the public generally. . . .' 29 U.S.C. § 401(b). As the Court of Appeals recognized:
>
> > 'Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.' 462 F.2d, at 780-781.
>
> "Thus, it is simply 'untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation. . . .' "

412 U.S. at 13-14. The post-election enforcement scheme of Title IV does not depend on the ability of individuals "to finance litigation." The statute in fact does not permit individuals to bring such litigation. Congress has vested in the Secretary of Labor the exclusive authority to bring litigation to upset the results of a union election. All a defeated candidate has to do is to get his "layman's" complaint to the Secretary.

This Court has repeatedly assumed that union members would be performing the tasks necessary for submission of a complaint to the Secretary without the assistance of counsel, and has tailored the interpretation of procedural requirements accordingly. See, *Hodgson* v. *Steelworkers*, 403 U.S. 333, 340-341 (1971); *Wirtz* v. *Laborers' Union*, 389 U.S. 477, 482-483 (1968); compare the decision of the majority below App. 12a, 21a. Attorneys' fees are thus not related to proper enforcement of Title IV; and, as shown in the text, *infra*, the availability of an award of attorneys' fees would not be consonant with the intent of Congress to structure post-election challenge litigation so as to minimize the burden on unions.

understood, the result in this case should not be affected. We submit that, under the words which the majority quotes from *Hall* as the appropriate standard, the remedy provided in Title IV is " 'meticulously detailed' to 'mark the boundaries of power to award monetary relief' " *and* the statutory history and scheme present a " 'definite and absolute setting of the Congressional face against' " permitting judicial imposition of a private award of attorneys' fees in a Title IV action.

In concluding otherwise, the court below misunderstood *Trbovich*. That decision did not work a basic change in the nature of Title IV litigation; to the contrary, it accommodated the congressional purposes behind the Title IV enforcement scheme by defining a limited role for a private intervenor which cannot jeopardize those purposes. The ruling below, by expanding that intervention role without heed to the limitations established by *Trbovich*, does jeopardize the very congressional objectives that *Trbovich* recognized and sought to protect.

Both the court below and the *Local 639* court misread the sentence in *Trbovich* which states that adoption by the House and the Conference Committee of the Senate's public enforcement provisions "can in no sense be read as a rejection of all forms of private participation in enforcement litigation, since the House at no time considered the possibility that union members might assist the Secretary rather than displace him." 404 U.S. at 536. Acting as if that sentence authorized "all forms of private participation" in a Title IV action, the court below and the *Local 639* court leapt to the conclusion that therefore *Trbovich* approves private remedies to intervenors in Title IV actions. But it does not require a careful reading of *Trbovich* to discover that the decision itself rules out all forms of private participation except those which "might assist the Secretary rather than displace him." The *Trbovich* Court circumscribed the role of a Title IV intervenor in this manner to assure that unions would receive the protection against the burdens of private plaintiff litigation that Congress intended them to have. Those burdens are of particular concern in the post-election challenge context where defeated candidates have a motivation to use the legal process to achieve political ends.

Therefore, the *Trbovich* Court permitted private intervention only to the extent it would subject "the union to relatively little additional burden." 404 U.S. at 536. The permissible scope of an intervenor's participation was defined as follows: "Thus, at least insofar as [an intervenor] seeks *only* to present evidence and argument in support of the Secretary's complaint, there is nothing in the language or the history of the LMRDA to prevent such intervention." *Id.* at 536-537 (emphasis added). But beyond support of the Secretary's complaint, the *Trbovich* Court refused to permit an intervenor to assert additional grounds for setting aside a union election (*Id.* at 537):

> "We recognize that it is less burdensome for the union to respond to new claims in the context of the pending suit than it would be to respond to a new and independent complaint. Nevertheless, we think Congress intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary. Accordingly, we hold that in a post-election enforcement suit, Title IV imposes no bar to intervention by a union member, so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint."

It is at least anomalous to say that an intervenor, who is disabled from asserting a single new ground for setting aside an election, may nevertheless in the context of a Title IV action present a whole new claim for a private remedy. But more important, to permit such a claim would subject unions to litigation burdens far in excess of those held impermissible in *Trbovich.* In a case such as the instant one, as we show below, litigation over fee claims would likely dwarf the litigation on the merits. Further, as we also show below, in the circumstances of the case here, litigation of the attorneys' fee claim would require resolution both of substantive allegations which the Secretary had made but which because of the settlement were not litigated *and* of additional substantive allegations which the intervenor was prohibited from raising on the merits but which he has asserted in (and which are necessary to) his fee application.

1. This Court has recognized "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorneys' fees" as a reason weighing against abandonment of the American rule. *F. D. Rich Co.* v. *Industrial Lumber Co.*, *supra*, 417 U.S. 116, 129 (1974). In particular, litigation of "common-benefit" claims can be massive,[6] and, because of the nature of the theory, litigation of a "common-benefit" claim in a Title IV case would likely be more extensive than elsewhere. The "common-benefit" theory, based as it is on a concept akin to *quantum meruit*, requires a showing by the applicant that *he* conferred a benefit upon those against whom the fee would be

charged; if the purported beneficiaries would have received the asserted benefit anyway—*e.g.*, if in the instant case, the Secretary would have secured the same result alone—no fee would be justified. Thus, litigation of the fee application in Title IV actions would require resolution of the following categories of factual issues: (1) did intervenor's counsel perform the numerous services alleged in the application; (2) if so, did they confer benefits on union members that would not have been conferred in any event by the work of the Secretary; (3) if so, how many hours were spent on activities conferring such a non-duplicative benefit; and (4) what is the reasonable value of the services for those hours. See, *Lindy Brothers Builders, Inc., of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 169-170 (3rd Cir. 1973); *City of Detroit* v. *Grinnel Corp.*, 495 F.2d 448, 471-472 (2nd Cir. 1974). Issues in the second category would put the union in the anomalous position of having to prove the effectiveness of counsel for the Secretary during the period those counsel were in an adversarial relationship to the union. Putting aside the problems of privilege that would plague such litigation, the accumulation of pertinent evidence would be massive and complex. The application for attorneys' fees here contains forty pages of factual allegations as to the services performed by counsel for intervenors—in 1,785 hours of attorneys' time—and the achievements said to have resulted therefrom. The application also makes numerous allegations as to failures of the Secretary properly to perform his duties. The Secretary, on the other hand, has submitted a statement to the district court in which he states that the Labor Department spent over 28,000 man hours achieving the very results for which intervenor's counsel claim credit. It is thus under-statement to say that litigation of the attorneys' fees claim here—that intervenor's counsel conferred a common-benefit that would not otherwise have been conferred by the work of the Secretary—would be a major undertaking.

---

[6] See e.g., *Lindy Bros. Builders, Inc.* v. *Am. Radiator, etc.*, 540 F.2d 102 (3rd Cir. 1976); *Merola* v. *Atlantic Richfield Co.*, 515 F.2d 165 (3rd Cir. 1975).

2. The burdens just described are multiplied when, as here, (i) the challenged election involved a small percentage of the union's members; (ii) the Secretary's suit is settled without an admission or finding of liability; and (iii) the court order that flows from the settlement has no application to the vast majority of the union's members. Were the award here sought merely from the union members within District 31, it would be of no consequence that the case on the merits was resolved by settlement instead of by trial. The benefit of the suit (although not necessarily the benefit of intervenor's attorneys' efforts) was the new election, and that benefit is no less real when achieved through a settlement. But the settlement of the suit achieved nothing in and of itself for union members outside of District 31; the court order contained neither declaratory nor injunctive relief that had any application outside of that District. Indeed, the court below conceived that the "benefit" conferred upon members outside of District 31 was not the relief provided in the settlement, but rather the expectation that "union leadership" would be deterred from engaging in misconduct in other districts. (App. 33a.) Assuming this expectation were a valid predicate for a "common-benefit" award (we suggest otherwise in part II, *infra*), it would require vastly expanded fee litigation:

(a) The rationale is inapplicable unless there was wrongdoing; if there was none, there is no repetition

to deter. Thus, establishing that violations occurred is a prerequisite to the award. Where, as here, the Secretary and the union settle without a finding or admission of violation, the merits would have to be tried simply to determine whether the predicate for a fee award exists. Apart from the burdens this would impose upon the union, it would reduce the incentives for settlement and frustrate Congress' hope that the Secretary would settle Title IV cases expeditiously.[7]

(b) The rationale depends upon finding further that the violations were committed by persons who have the capacity to commit them elsewhere, in elections involving members outside District 31. As the decision below recognized (App. 33a), the award requires a finding that the "union leadership" was responsible for the misconduct. Here, the Secretary's complaint alleged only wrongdoing by District 31 members. Intervenor's fee application, however, alleges culpability on the part of the union's national officers as well. The fee litigation thus would require adjudication of a substantive claim never advanced by the Secretary—whether the "union leadership" violated Title IV—in direct contravention of *Trbovich*.

As the fee application in this case reveals, the opportunity for a defeated candidate to litigate whether he has conferred a "common-benefit" can be as subject to the abuse of political motivation as the opportunity to litigate that the election was unfair. The vulnerability of the union to burdensome, unfounded, and harassing litigation is as great in either instance. Congress' enforcement scheme, found in *Trbovich* to require "limiting" intervention to "insulate the union" from the "burden" of defending even a single additional substantive ground advanced by an intervenor, leaves no room for subjecting unions to litigation in Title IV suits over a private award of fees for an intervenor. The decision below to the contrary should not go unreviewed.

---

[7] *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

II. *The "Common Benefit" Issue*

This case presents the first opportunity for this Court to demarcate the line between the "historic" common benefit principle recognized in *Alyeska* and the "expanded" common benefit theory rejected therein. The decision below, while paying lip-service to *Alyeska*, in fact disregarded the principles established in that decision. The majority below, invoking the label "common-benefit" where it does not rightfully apply, in fact authorized an award of attorneys' fees for the acknowledged purpose of encouraging private enforcement of a statute in which Congress had not authorized fee-shifting. Such misuse of the "common-benefit" exception presents a significant threat that this Court's holding in *Alyeska* will be undermined.

In *Alyeska*, this Court rejected the argument that federal courts have equitable power to award fees on a "private attorney general" theory in the absence of congressional authorization. Declaring that the "American rule" is that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," 421 U.S. at 247, this Court concluded that it was for Congress, not the Judiciary, to determine

under which statutes, and on what terms, fee-shifting should be allowed:

> "Nor has [Congress] extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves . . . Under the scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.
>
> ". . . [C]ongressional utilization of the private-attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.
>
> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fee under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant

> and to allow attorneys' fees only in connection with the former." 421 U.S. at 260-264 (footnotes omitted).

This Court recognized, of course, that "in limited circumstances" there have been found "exceptions"—"assertions of inherent power in the courts to allow attorneys' fee in particular situations, unless forbidden by Congress," *id.* at 257, 259. One of these exceptions is the "common-benefit" rule, *id.* at 257-258, whose availability this Court defined as follows:

> "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." *Id.* at 265, n. 39.

But the Court in *Alyeska* rejected any "expanded version of the common-fund approach" which would effectively nullify the American rule by making fees generally available, *id.* at 265-266, n. 39, declaring that the "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees" lest they "make major inroads on a policy matter that Congress has reserved for itself," *id.* at 269.

In the instant case, the court below half-heartedly (and erroneously, as we will show in a moment) undertook to define certain "benefits" which all members of the union would derive from intervenor's efforts. But it was ultimately forced to acknowledge that even on its reasoning an award against the union's treasury would not shift the costs "with some exactitude to those benefiting." It acknowledged that the members within District 31 received a greater benefit than those without the District, yet each member, whether within or without the District, would be charged equally for the fee (App. 32a-36a). At this point in the opinion, however, the court disclosed its true concern: because District 31 does not have a treasury, the only vehicle available for fee-shifting is the union's international treasury, and if a fee could not be assessed against the entire union membership, "the process of complaint and productive intervention by union members" would be "thwart[ed]," and "the policies enunciated by the LMRDA and *Trbovich* would be "den[ied] effect" (App. 36a). The court was here repeating the conclusions it had earlier reached in its "statutory preclusion" analysis: to deny fee awards "would be to deny *Trbovich* all effect" (*id.* 21a); "courts and legislatures do not ordinarily create roles—strong roles—and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively" (*ibid*).

This language is, surely, that of the "private attorney general" theory, which this Court declared in *Alyeska* was not available to the Judiciary absent congressional authorization. And lest there by any doubt that this is what the court below intended, it went on to make the point even clearer. It is more appropriate that the wrongdoing union pay the fees than "to penalize the intervenor who performed his function correctly and well" (*id.* 35a). Never mind that the members of the union might not appreciate a fee being charged to them for an attentuated "benefit" they could not possible perceive: "If the rank and file is dissatisfied, their recourse lies with the Union leaders who were responsible" (*ibid*). This "punch-line" of the decision below is the antithesis of "common-benefit"—it sounds more of "common detriment": all members should share equally in paying for the union's sins. That is not, we think, one of the "historic" exceptions recognized in *Alyeska*.

Of course, as we have noted, the court below attempted to find "benefits" accruing to all the union's members. But evaluated apart from the court's acknowledged "private attorney general" purpose, its "common-benefit" analysis falls woefully short of meeting the standards enunciated by this Court. Those standards are two-fold: (1) that the costs be assessed proportionately among those benefiting, and (2) that absent such assessment the beneficiaries would be enriched unjustly at the claimant's expense. As we show, neither standard is met here.

(1) *Equitable Assessment*

As this Court stated in *Alyeska*, a common-benefit award is only permissible where the "benefits [can] be traced with some accuracy, and there [is] reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." 421 U.S. at 265, n. 39. Proper application of the exception requires that it "will . . . operate to spread the costs of litigation proportionately among [the] beneficiaries . . ." *ibid.* The award sought here lacks the indispensible ingredient of a common-benefit award: it would not spread the costs proportionately among those who receive the benefit.

At the threshold, it is not accurate here, as it was in *Hall* v. *Cole*, *supra*,[8] to say that intervenor shares the

---

[8] The plaintiff in *Hall* v. *Cole* had been expelled from the union for "introducing a set of resolutions alleging various instances of undemocratic actions and shortsighted policies on the part of union officers." 412 U.S. at 2. His lawsuit secured a judicial determination that the Union's officers, by attempting to stifle criticism of their conduct, were violating Section 101(a)(2) of the LMRDA—the "free speech" provision of Title I. In upholding an award of attorneys fees under the "common benefit" rationale, the Court explained (*Id.* at 8-9):

> "[T]here can be no doubt that, by vindicating his own right to free speech guaranteed by §101(a)(2) of Title I

benefits of this lawsuit in "common" with other union members. The very reason he was permitted to intervene was because he had a special, personal interest distinct from the interest of the rest of the membership, *Trbovich*, *supra*, 404 U.S. at 538-539: his political interest in securing the $35,000 per year job of Director of District 31. As a result of the litigation, he received that benefit, no other union member did. At best, the other members of the USWA secured a benefit of a different rank, and significantly less tangible.[9]

To spread the costs among all members would thus confer a windfall upon intervenor: all members—including the 20,000 who voted against him in the rerun, the majority in District 31 who did not care enough to vote at all in the rerun, and the nearly 1,300,000 who were not even eligible to vote therein—would be forced

---

> of the LMRDA, respondent *necessarily rendered a substantial service* to his union as an institution and *to all of its members.* When a union member is disciplined for the exercise of any of the rights protected by Title I, *the rights of all members of the union are threatened.* And, by vindicating his own right, the successful litigant *dispels the 'chill' case upon the rights of others.* . . . Thus, as in *Mills* [a corporate shareholder case], reimbursement of respondent's attorneys fees out of the union treasury simply shifts the costs of litigation to *'the class that has benefitted from them* and that would have had to pay them had it brought the suit.'" (emphasis added).

[9] Justice Marshall's dissenting opinion in *Alyeska* saw the "common benefit" cases as one instance of a more general equitable power to award fees where three conditions are present, the second of which he stated as follows: "(2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel," 421 U.S. at 285, a condition which he believed met in *Alyeska* because the plaintiffs' involvement "was largely altruistic" and their tangible gains from litigation were "truly dwarfed by the demands of litigation," *id.* at 286. Even measured by this "expanded" definition which the Court rejected in *Alyeska*, *id.* at 265, n. 39, intervenor herein would not have qualified.

to finance his quest for union office through this litigation. By contrast, the plaintiff in *Hall* v. *Cole*, *supra*, was an ordinary union member who secured from his lawsuit a status and protection no different from that which the suit assured to all other members. The rule that a common-benefit award is permissible only where there is "reason for confidence that the costs could be shifted with some exactitude to those benefiting" was met in *Hall* but not here.

Further, the award that appellant seeks would come from the union's treasury, which consists of dues paid by 1,400,000 members throughout the United States and Canadá; and only 9% of those members are within District 31.[10] Thus 91% of any fee award here would be paid from the dues of members in other districts. Yet, the only election violations alleged in this lawsuit were alleged to have been committed by persons within District 31. And the consent order in the court below merely directed a rerun of the District 31 election. Members outside District 31 have no substantial interest in District 31's elections, as is evidenced by the fact that they are not entitled to vote in those elections.

The majority below acknowledged that those within District 31 received a "greater" benefit than those without (App. 36a), but professed nonetheless to find that those without "received a legally sufficient and significant benefit" (*id.*). That benefit was said to come in two parts.

First, the effect of intervenor's actions "was vindication of democratic process in USWA elections, and his actions redound to the common benefit of the whole Union" (App. 33a). This is so because

---

[10] District 31 is an administrative sub-division of the union, which does not have a treasury of its own. Accordingly, the only treasury against which intervenor could claim a fee is that of the union.

> "Sadlowski was not merely opposed by a member of the USWA 'official family,' Union officers and agents actively campaigned against him . . . Union leadership having exerted such effort to oppose the candidacy of a single insurgent, it would be naive to assume that similar election 'irregularities' have not or would not spread to other districts and locals where a member of the 'official family' ran opposed. Had such tactics been successful in District 31, there appears to be little doubt that they would have been employed again, and again." (App. 33a).

This analysis is riddled with *non sequiturs:*

(i) As we have noted, there has been no finding in this case that any election "irregularities" occurred; the case was settled without an admission or finding of liability. Before it can be assumed, even by the non-"naive," that irregularities "would have been employed again, and again," it must be found that they were employed in the first place. (Contrast *Hall* v. *Cole*, where there were litigated findings of illegal behavior). Thus, as we have noted in Part I above, this case would have to be tried on the merits to determine whether this starting point for a fee award exists.[11]

(ii) As we have further noted, the only "irregularities" alleged by the Secretary were said to be committed by persons within District 31, who have no capacity to employ them "again, and again" in other districts. Thus even if the Secretary's allegations had been proven and found, they would not furnish a predicate for a fee award outside District 31. The majority below thought it significant that the national officers had campaigned for intervenor's opponent, but to jump from the innocent fact of campaign support to a conclusion that the national officers were responsible for the local misconduct and would repeat it "again, and again" in other districts is not only a *non sequitur*, as the dissent noted (App. 50a-51a), it is contrary to the Secretary of Labor's determination—which Congress intended would be conclusive[12]—that the sources of wrongdoing were local. Intervenor's attorneys proposed to bridge this gap by undertaking to prove what the Secretary did not allege—that the national officers were responsible for the alleged violations. But as we have explained in Part I, the congressional plan would be undermined were intervenors allowed to prosecute allegations against national officers—allegations not deemed meritorious by the Secretary—solely to rationalize a fee award which otherwise does not fit the common benefit rationale.

---

[11] Where a settlement confers benefits directly upon a class of beneficiaries, it is unimportant whether that settlement was predicated upon violations. But here, the settlement does *not* confer any benefits directly upon members outside District 31, and the benefit is said to consist of the stifling of potential repetitions of misconduct. In that context, a determination that there *was* misconduct would be critical.

(iii) Moreover, even if such litigation were allowed, and such violations were found, the majority below does not explain what "benefit" would have been conferred on members outside District 31 by the settlement here. There is no injunction against future misconduct: if misconduct occurred in a later election in another district, the Title IV process would have to begin all over just as if this case had never arisen. If the court's unstated premise is that the outcome of this case will have educational value, teaching "union leaders" that defective elections will have to be rerun, it is doubly fallacious: (1) Title IV on its face teaches that; (2) it would equally justify an award against the treasuries of other unions, whose leaders will have received the same education from the resolution of this case. The court acknowledged that it would be extending the common benefit doctrine "to ludicrous dimensions" to assess an award against a large group simply because "every union member, and every individual might be said to benefit from vindication of union democracy" (App. 35a).

Apart from the "vindication of union democracy" rationale, the other "benefit" which the court below thought inured to members outside District 31 consists in the fact that while the "main function of a district director" is to administer his district, each director also serves on the union's Executive Board (34a). But as members in other districts have no voice in selecting the director of District 31, a new election can "benefit" them only if the victor happens to take voting positions on the Board more to their liking. As this is a matter of personal predilection, and not all would likely favor a change, it cannot be the basis for assessing a fee against all. Moreover, even if all members were thought to "benefit" in this manner, the benefit is of a much smaller order than that conferred upon members in District 31—who allegedly have been provided an opportunity for democratic expression theretofore denied them, and who are selecting the officer who will administer their day-to-day union affairs. The interest of members outside District 31 here is less than that of a Vermont citizen in a congressional race in Mississippi (where the winner devotes a much larger proportion of his time to national affairs). The logic of the decision below thus would dictate—questions of sovereign immunity aside—a fee award against the United States treasury whenever a candidate successfully challenged election misconduct in a single congressional race.

---

[12] *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

(2) *Unjust Enrichment*

Apart from its failure to meet *Alyeska's* requirement of proportionate fee-shifting, the decision below founders on a separate point: there is not here the element of "unjust enrichment" which is the underlying predicate for any common benefit award.

As this Court explained is *Hall* v. *Cole, supra:*

> " 'Fee shifting' is justified in these cases, not because of any 'bad faith' of the defendant but, rather, because '[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses *would be to enrich the others unjustly at the plaintiff's expense.*'
>
> * * * *
>
> "Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to *the class* that has benefited from them and *that would have had to pay them had it brought the suit.*"

412 U.S. at 5-6, 8-9 (footnote omitted, emphasis added).

Critical to this concept is that the beneficiaries would otherwise have had to pay the costs themselves to get the benefit. But the enforcement scheme of Title IV renders this concept inapplicable.

Neither intervenor nor any other USWA member had the power to bring the lawsuit which conferred the benefits here. Only the Secretary had the power to bring that suit. When he did so, he acted, in effect, as the attorney for all the union members affected by the election. *Trbovich, supra*, 404 U.S. at 539. It is doubtful that any of the members other than intervenor would have had standing to intervene with their own attorneys; but even if they could have, there is not a shred of evidence to suggest that they were dissatisfied with the lawyer which Congress provided them free of charge. Intervenor, on the other hand, solely because of the special *personal stake* he had in the lawsuit, had a right, if he wished, to reject the Secretary's free representation and to intervene with his own legal counsel. *Ibid.* He adopted that course. His intervention was permitted only for the purpose of protecting his personal, political interests in the outcome; it in no way diminished the exclusive role of the Secretary as protector of the general interests of the union members. Now, the Secretary having successfully settled the suit other intervenor's objections, intervenor asks the entire membership of USWA to chip in to pay the fees of his personal lawyer—and to pay for the litigation necessary to determine what those fees should be.

The concern for "unjust enrichment" underpinning the common benefit exception to the "American rule" does not fit this situation. Here, Congress conferred upon all union members a complete way to vindicate their interests in union democracy without cost: reliance upon the representation of the Secretary. To have so relied cannot be said to be "unjust." To be saddled with the fees for intervenor's personal attorneys *can* be said to be "unjust."

We have dwelt at length upon the infirmities of the decision below because we think it a dangerous precedent in two respects:

(1) In the particular instance of suits against unions, it threatens to discard the principles of *Alyeska* altogether, and to make international unions the "deep pocket" victims of fee awards whenever subsidiary union bodies commit violations of law. The rationale articulated by the majority below has no stopping point short of that result. At least one Circuit has rejected that rationale, declaring that to assess fees against the

international for a suit which corrected violations affecting a single local would be a "punitive award" not justified by the common benefit exception. *McDonald* v. *Oliver*, 525 F.2d 1217, 1228 (5th Cir. 1976).

(2) More importantly, the decision below maps out an approach to undermining the principles of *Alyeska* which, if not checked, would usurp from Congress the prerogatives which *Alyeska* declared to reside in that body. If courts may so blatantly enforce their "private attorney general" precepts in the absence of statutory authorization, with so flimsy and facile lip service to the requirement of proportionate benefit which has historically marked the common benefit exception, there will be many cases in which judicial ingenuity would be equal to the task.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Gottesman, Cohen
& Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

JAMES D. ENGLISH
CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioner

APPENDIX

APPENDIX A

Before VAN DUSEN and ALDISERT, Circuit Judges, and BROTMAN, District Judge.*

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

This is an appeal from a district court order, arising out of an action brought by the Secretary of Labor (Secretary) under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481 *et seq.*,** to set aside an election for district director of District 31 of the United Steelworkers of America (USWA or Union). In this election, Edward Sadlowski, the intervenor-plaintiff, was narrowly defeated allegedly due to voting irregularities which violated LMRDA. After settlement was reached, a new election was held, which Sadlowski won by a substantial margin. The present appeal concerns the district court denial of intervenor-plaintiff's application for attorneys' fees and expenses incurred in the process of protesting and assisting the Secretary in attacking LMRDA violations.

This appeal presents important problems in the administration of Title IV of the LMRDA. The district court held that a defeated candidate for union office who intervenes in an action brought by the Secretary of Labor to void an election is precluded by the statute from recovering an award of attorneys' fees against the union, and that even if there is no statutory preclusion such an intervenor may not recover attorneys' fees under the "common benefit" doctrine for his actions in complaining to the Secretary, participating in litigation, shaping a settlement, and helping to police a rerun election.[1] The Secretary takes no position on the district court denial of attorneys' fees.

---

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

** See Appendix for the most pertinent provisions of Title IV (29 U.S.C. § 481 *et seq.*).

Disagreeing with the district court as to both statutory preclusion and "common benefit," we will reverse this district court order and remand for further consideration of this record in the light of the applicable legal principles and for further proceedings consistent with this opinion.

I. HISTORY OF THE CASE

As noted below at pages [5a, 25a, 30a–31a], this appeal is before the court on a motion to dismiss in which defendant requests that the application for attorneys' fees "be dismissed on its face (see page [30a–31a] below), without regard to the actual truth of (1) the allegations in this application, and (2) the statements in the other record documents, such as depositions. We emphasize that we are not passing on the truth of the statements in the record or on the character of the intervening plaintiffs, as opposed to that of the high-ranking officers of the union, but we are required, under the posture of the case as it existed at the time of the district court order from which the appeal was taken, to take all well-pleaded allegations in the record as true for purposes of this appeal and to construe them in the light most favorable to the plaintiffs (see page [30a–31a]). These record facts are important in the determination of whether the district court was justified in rejecting the application for attorneys' fees as a matter of law, rather than making its decision as a matter of discretion in the light of the record facts before it.

---

[1] The district court concluded:

> ". . . I find no support in fact or in law for the grant of counsel fees in a suit brought under the general provisions of Title IV of the L.M.R.D.A., 29 U.S.C. §§ 481–483.
>
> * * * * *
>
> ". . . The exception . . . recognized by the Third Circuit . . . [is] . . . (2) the conferring of a common benefit for the recovery of a fund or property;
>
> * * * * *
>
> "Counsel for the intervenor has failed to demonstrate the existence of . . . a basis in law or a recognized exception to the general American rule which recognizes an award of attorneys' fees."

Brennan v. *United Steelworkers for America*, Civil Action No. 73–957 (W.D.Pa. December 11, 1975), reproduced in appendix at 201a–206a.

We disagree with the above-quoted conclusion of the district court as applied to this record.

On February 13, 1973, the USWA held an election for the position of district director of its District 31. That unit, with approximately 300 locals and 130,000 members in Illinois and Indiana, is the largest district in the Union. This election for district director was the first to be contested in nearly twenty-five years.

The candidates were Edward Sadlowski and Samuel Evett, the personally chosen successor to the district's long-time director, who was retiring after thirty years in office. Evett, in the words of then USWA President I. W. Abel, was the candidate of the Union's "official family."[2] Abel explained that the "official family" was composed of incumbent district directors and the officers of the International Union. The benefits of "official family" membership included automatic support—financial and otherwise—in their election efforts.[3]

Early election returns gave Sadlowski a lead, but a complete tabulation took nearly three days. During that period Sadlowski received reports of widespread violations of LMRDA, such as ballot fraud, illegal electioneering, deprivation of secret ballot, and interference with observers. The final tabulations published by the USWA International Tellers were: Evett 23,394, and Sadlowski 21,606. In view of the reports of massive irregularities, Sadlowski immediately sought legal assistance to aid him in protesting the election in accordance with the requirements of the USWA constitution.[4] Such a challenge was mandated by the LMRDA requirement that international union remedies be exhausted as a prerequisite to filing a complaint about an election with the Secretary of Labor.

---

[2] Deposition of I. W. Abel at 5–7, Document No. 62B in *Brennan v. United Steelworkers of America*, Civil Action No. 73–0957B (W.D.Pa., Filed August 22, 1974).

[3] *Id.* at 6–16.

[4] See next page

Sadlowski's protest was submitted to the USWA International Tellers on February 23, 1973, and a hearing was held on March 23, 1973. In late April 1973 the Tellers issued a report upholding the election of Evett. By letter dated May 1, 1973, Sadlowski appealed that decision to the USWA International Executive Board, again in accordance with the Union constitution. On May 31, 1973, with President I. W. Abel presiding, the Board considered Sadlowski's complaint. On that same day the report of the Tellers was sustained.

Sadlowski then filed a timely complaint with the Secretary, pursuant to Title IV of the LMRDA, 29 U.S.C. § 482(a). The Department of Labor completed its Report of Investigation in August 1973, and on November 8, 1973, the Secretary instituted suit in the Western District of Pennsylvania seeking to void the District 31 election. Sadlowski's motion to intervene as a plaintiff was granted by the district court in January 1974.

After extensive pretrial proceedings, in which Sadlowski's counsel played an active role, the district court approved a settlement agreement, on August 23, 1974. It directed that a new election for district director be held on November 19, 1974. In this new election, Sadlowski was elected director of District 31 with 39,637 votes to 20,158 for Evett. An order and decree, based upon the Secretary's certification of the election results, was entered on December 2, 1974.

On January 31, 1975, counsel for Sadlowski submitted a Verified Application for Attorneys' Fees and a supporting memorandum. The district court referred the application to a magistrate. After briefing and argument, the magistrate recommended that the request be denied. Sadlowski filed exceptions to the magistrate's recommendation, and after a hearing the district judge overruled the exceptions and adopted the Magistrate's Report and Recommendation, making the sweeping legal conclusion set forth in note 1 above. This appeal followed.

II. ISSUE OF STATUTORY PRECLUSION

The threshold question in this case is whether an award of attorney's fees to an intervenor-plaintiff such as Sadlowski is precluded by Title IV of the LMRDA.[5]

---

[4] Article V of the Constitution of the International Union of the United Steelworkers of America (AFL-CIO, CLC, adopted at Las Vegas, Nevada, September 21, 1972) provides in relevant part:

> "Sec. 18. All contests in connection with the votes of any Local Union must be filed with the International tellers not later than ten (10) days after the date of election, by a member of the Local Union whose vote is contested.
>
> * * * * *
>
> "Sec. 21. All contests growing out of the report of the International Tellers shall be filed with the International Executive Board, not later than ten (10) days following the mailing of the report to the Local Unions and candidates. The International Executive Board shall decide all such contests prior to June 1, of the election year."

[5] This issue has apparently been considered only once before on the appellate level, by the District of Columbia Circuit in *Usery v. Local Union 639 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind.*, 543 F.2d 369 (D.C.Cir.1976) (hereinafter *Local 639*), *cert. denied sub nom. Local Union No. 639 v. Marshall*, —— U.S. ——, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977). We are greatly aided by the analysis of Judge Leventhal, and reach similar conclusions on very similar reasoning.

Local 639 differs from the instant case in that there the court granted summary judgment for the Secretary and intervenors, holding certain conduct to have been violative of Title IV; here a settlement agreement was reached whereby the USWA agreed to conduct a new election. As the *Local 639* opinion noted, and as we find, the difference is not significant. Ultimate success in the form of a judgment has not been required in other contexts, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Yablonski v. United Mine Workers*, 151 U.S.App.D.C. 253, 466 F.2d 424, 431 (1972), *cert. denied*, 412 U.S. 918, 93 S.Ct. 272, 37 L.Ed.2d 144 (1973); *cf. Kaham v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied sub nom. Glen Alden Corp v. Kaham*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970), and Sadlowski's efforts and success are undiminished by the method used to achieve them.

The Union advances two reasons for finding preclusion, both of which fall under the rubric of the nature and comprehensiveness of the remedial scheme: (1) the absence of specific authorization to award attorney's fees under Title IV, and (2) the fact that the primary enforcement responsibility for Title IV rests with the Secretary of Labor rather than with private litigants. We disagree, because we have concluded that the district court had the right, in its discretion, to award attorneys' fees on the record in this case. We hold that the district court did not have the power to reject the claim for attorneys' fees on the basis of the legal conclusions stated in note 1 above, which we reject.

A. *Absence of Specific Authorization for an Award*

The Union urges that an award of attorney's fees under Title IV of the LMRDA is precluded by the absence of any specific provision for such an award in Title IV, in view of specific provision for either attorney's fees or appropriate relief in Titles I, II, III and V.[6] It buttresses this contention by noting that Congress rejected a bill, H.R. 8342, 86th Con., 1st Sess. § 402(a) (1959), which provided for union member suits under Title IV, and authorized the award of appropriate relief, inclding attorney's fees.

USWA primarily relies upon ***Fleischmann Distilling Corp. v. Maier Brewing Co.***, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967) for the proposition that an explicit, comprehensive, and exclusive remedial scheme may bar the recovery of attorney's fees. In *Fleischmann,* the Supreme Court held that, because the remedial provision of the Lanham Act specifically "provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances," (386 U.S. at 719, 87 S.Ct. at 1408), such precise specification of remedies, encompassing authority which could as a practical matter be used to relieve the burden of counsel fees, presented a strong case against further judicial relief. Although we agree that a truly comprehensive remedial scheme may bar such an award in certain circumstances, we believe that the analytical method embraced by *Fleischmann* was substantially undercut by later Supreme Court decisions, thus casting considerable doubt upon the interpretation urged by the USWA.[7]

In *Fleischmann,* the Court was willing to find preclusion in Congress' selective provision of attorney's fees in other statutes and unsuccessful efforts to enact a similar measure into the Lanham Act. But in ***Mills v. Electric Auto-Lite Co.***, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) and ***Hall v. Cole,*** 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), the Supreme Court enunciated a presumption against preclusion and sanctioned "common benefit" awards in the context of statutory causes of action despite the provision for attorney's fees in other sections of the same statute. *Mills,* 396 U.S. at 390–91, 90 S.Ct. 616; *Hall,* 412 U.S. at 10–11, 93 S.Ct. 1943.

In *Hall,* the Supreme Court held that a plaintiff in a suit instituted under Title I of the LMRDA could recover attorney's fees even though Title I does not specifically authorize such an award. It stated that unless remedies are " 'meticulously detailed,' " to " 'mark the boundaries of power to award monetary relief,' " 412 U.S. at 9, 93 S.Ct. at 1948, or the legislative history presents an unmistakably " 'definite and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with established equitable principles,' " *id.* at 12, 93 S.Ct. at 1950, it will not be inferred that Congress desired to deny to the courts the traditional power to grant equitable relief in the form of counsel fees in appropriate cases.

---

[6] Title I, the bill of rights of union members, relies upon private enforcement and provides for "such relief . . . as may be appropriate," 29 U.S.C. § 412. Title II, reporting provisions, also relies upon private enforcement, but expressly provides for the discretionary award of attorney's fees, 29 U.S.C. § 431(c). Title III, union trusteeships, provides for private enforcement, and, like Title I, approves relief as may be appropriate, 29 U.S.C. § 464(a). Title V, fiduciary responsibility of union officers, gives union members the right to sue, and specifically indicates that attorney's fees are part of the "appropriate relief" recoverable, 29 U.S.C. § 501(b).

[7] *See* Comment, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.,* 38 U.Chi. L.Rev. 316, 321–25 (1971).

At oral argument the Union's counsel contended that the rejection by Congress of a version of Title IV that provided for direct private enforcement and attorney's fees was conclusive evidence of an intent to limit the courts' exercise of their equitable powers in suits under Title IV. Such intent cannot, in our view, be drawn from the legislative record. As the Supreme Court's review of this legislative history in *Trbovich v. United Mine Workers,* 404 U.S. 528, 532–36, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972) makes clear, congressional debate centered upon the relative merits of enforcement actions by union members and by the Secretary of Labor—not upon the propriety or the possiblity of equitable awards. *Local 639* pointed out:

> "The Conference Committee and the House ultimately adopted the public enforcement scheme of the Kennedy-Ervin bill, S. 1555, presumably because they agreed with the Senate that the Secretary should screen frivolous complaints and consolidate meritorious ones.[51] This legislative history, as *Trbovich* holds, 'can in no sense be read as a rejection of all forms of private participation in enforcement litigation,' because Congress never focused on 'the possibility that union members might assist the Secretary rather than displace him.' *Id.* at 536, 92 S.Ct. 630. Similarly, while Congress adopted a particular mode of enforcement, it failed to address with any detail the scope of relief, or what the court's role would be at the remedial stage. [One footnote omitted.]"

543 F.2d at 387. In no sense can this legislative history be said to offer the affirmative guidance the Union asserts that

---

[51] The Conference Report simply states that the Senate bill's administrative enforcement scheme prevailed over the House bill's private suit provision, without tendering any explanation for the outcome. H.R.Rep.No.1147, 86th Cong., 1st Sess. 35 (1959).

it does. As Professor Archibald Cox, a principal consultant to the draftsmen of the LMRDA, has suggested:

> "because much of the bill was written on the floor of the Senate or House of Representatives and because so many sections contain calculated ambiguities or political compromises . . ., the courts would be well advised to seek out the underlying rationale without placing great emphasis on close construction of the words."

Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich.L.Rev. 819, 852 (1960). To hold that the undiscussed, unexplained adoption of an alternative enforcement scheme satisfies the "definite and absolute" standard promulgated by *Hall* would, in this case, be incorrect.

Nor do we believe that the remedial scheme created by Title IV approaches the meticulous detail of the provision involved in *Fleischmann*—or the detail necessary for a finding of preclusion of equitable powers and remedies. Since its enactment, the LMRDA, and Title IV, enforcement scheme has been filled out by the court with many details. In *Hall v. Cole,* which dealt with preclusion of the exercise of equitable powers and the award of attorney's fees under Title I of the LMRDA, the petitioners argued that Congress intended to preclude any such award under Title I since it only provided for "such relief (including injunctions) as may be appropriate," while §§ 201(c) (29 U.S.C. § 431 (c)) and 501(b) (29 U.S.C. § 501(b)), expressly provided for attorney's fees. In response, the Supreme Court stated that:

> "Confronted with a virtually identical situation in *Mills,* we explained that the inclusion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorney's fees 'should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate. . . .' 396 U.S., at 390–91, 90 S.Ct. [616], at 625."

412 U.S. at 11, 93 S.Ct. at 1949.

Title IV itself has been the subject of considerable judicial elaboration and expansion. In *Trbovich, supra*, the Supreme Court held that union member intervention in suits brought by the Secretary for violation of Title IV was not precluded by the fact that actions by the Secretary are the exclusive post-election remedy provided for by the statute. *Trbovich* was extended in *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), which held that union members are entitled to a statement of supporting reasons where the Secretary decides not to pursue the union member's complaint.

The fact that the Supreme Court has found it necessary to supplement the structure of Title IV on two occasions suggests that the guidelines of *Hall* (see page [7a–8a] above) have been met by the facts of this case. Also, *Trbovich* and *Bachowski* go much further toward supporting the view that:

> "notwithstanding the absence of a broad relief provision in section 402, the court in a Title IV action faces the same task as if it were adjudicating a union member suit under the other titles—to grant relief according to the necessities of the case, *i.e.*, to fashion 'appropriate' relief."

Local 639, 543 F.2d at 388. The question is not whether a union member is entitled to recover attorney's fees under the statute alone, where the role prescribed for him is complaint to the Secretary after exhaustion of internal union procedures. The question is what relief a union member is entitled to after having intervened in and participated in the prosecution of an action brought by the Secretary under Title IV *in the manner anticipated by the Supreme Court in Trbovich.*

B. *Intervenor's Role in Administrative Enforcement*

At the outset of this inquiry, it is clear that the Secretary has the exclusive power to bring post-election challenge suits, and that aggrieved candidates are permitted to intervene solely to support the Secretary's complaint and may not add substantive claims. *See Trbovich*, 404 U.S. at 530–37, 92 S.Ct. 630. However, correct as those observations are, they overlook the role of union members and intervenors in prosecution of Title IV violations, and the relationship between union members, intervenors, and the Department of Labor under both the statute and the relevant Supreme Court decisions.

Even absent the gloss of case law, it is apparent that the Congress intended to rely heavily upon the vigorous efforts of union members in prosecuting Title IV violations. The statutory framework embodies a critical role for union members.

The initial burden of enforcement falls upon the individual member, and the Secretary's role is defined by those efforts. The first step in enforcement, under section 402(a), is for a union member to challenge the election before the union. Once remedies available under the union constitution and by-laws have been exhausted, or have been invoked without obtaining final decision within three calendar months, the union member may, within one calendar month thereafter, file a complaint with the Secretary alleging violation of any provision of Title IV.

Once the union member's complaint has been filed with the Secretary, section 402(b) directs the Secretary to investigate it. If he finds probable cause to believe that a violation has occurred and has not been remedied, he must, within 60 days after the filing of such a complaint, bring a civil action in federal district court against the labor organization to set aside the invalid election. If the court finds a violation of Title IV it may declare the election void, and direct the conduct of a new election under the Secretary's supervision.

As the Supreme Court's review of the legislative history, in *Trbovich*, 404 U.S. at 532–33, 92 S.Ct. at 633, indicates:

> "Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones,

> and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court. The alternative proposals were rejected simply because they failed to accomplish these objectives. There is no evidence whatever that Congress was opposed to participation by union members in the litigation, so long as that participation did not interfere with the screening and centralizing functions of the Secretary."

The addition of the exhaustion requirement, section 402(a)(1), provides additional protection for the union, since unions are thereby given the opportunity to resolve union member complaints internally and may correct any election irregularities themselves. Yet, as is undeniably apparent, at the same time Congress sought to prevent frivolous litigation it created a pivotal role for union members in the enforcement process.

In fact, quick action and skillful advocacy are probably most important at the initial stages of the enforcement scheme, when infractions must be identified, a bill of particulars formulated, the internal union procedures exhausted, and a complaint drafted for presentation to the Secretary. Prompt, thorough, and proper action in the earliest stages is essential to vindication of Title IV rights, since preservation of all election defects is a prerequisite to government intervention. The Secretary may not seek to avoid an election on bases not raised in "some discernible fashion" by the complainant before the union, *Hodgson v. Local 6799, Steel Workers,* 403 U.S. 333, 340–41, 91 S.Ct. 1841, 29 L.Ed.2d 510 (1971), or which the union did not have a fair opportunity to consider and redress. *Wirtz v. Local 125, Laborers,* 389 U.S. 477, 484, 88 S.Ct. 639, 19 L.Ed.2d 716 (1968). The clear effect of Title IV is to make the Secretary dependent upon the diligence of the union member. The Secretary's very authority to sue derives from the union member's pursuit of Title IV remedies and subsequent formal filing of a complaint with the Secretary.

Since *Trbovich,* union members play an even more significant role in the prosecution of Title IV violations, as intervenors. As the United States Court of Appeals for the District of Columbia Circuit noted in *Local 639*:

> "It is not difficult to conceive of examples of material assistance to the Secretary and the court in the vindication of the interest—of the public and the union rank and file—in union democracy. . . . [C]ounsel representing the intervenor may unearth material and even elusive evidence, or develop telling arguments in support of the Secretary's claims of illegality. . . . [T]he *Trbovich* court envisioned that intervenors would perform a role independent of the Secretary in helping the court fashion a suitable remedial order, and perhaps even assist the Secretary in supervising the conduct of the rerun. . . . [S]ound principle advises that error is more likely to be exposed when intervenors are able to secure competent counsel because of the prospect of recovering attorney's fees." [Footnotes omitted.]

543 F.2d at 384.

The notion of private participation in the prosecution of Title IV violations, notwithstanding the involvement of the Department of Labor, is fully consistent with the form and purpose of this statute. Not only is the intervenor often in a position to obtain information which might, for whatever reason, be difficult for the agency to marshall or preserve, but his perspective and the intensity of his interest allow him to contribute to the court's total understanding.[8] Sadlowski's experiences and activities in protesting election irregularities provide a vivid illustraton of obstacles which complainants and intervenors face—and the insights their involvement can render. They also offer a glimpse into the actual operation of Title IV.

After suspiciously late returns from key locals, and reports of Title IV violations during the February 13, 1973 election, Sadlowski decided to contest the reported results and sought legal assistance. His need for counsel cannot be doubted. From the time, three days after the election, that Chicago attorney Leon Despres agreed to represent him,

---

[8] Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv.L.Rev. 721, 746 (1968).

Sadlowski had only seven days to file an appeal with the USWA International Tellers, under the terms of the Union constitution. To appeal an election involving 300 locals with 130,000 members is no mean task under the most congenial circumstances, and time constraints, combined with the necessity for accurate, complete, and properly presented claims firmly underscore the fact that Sadlowski's decision to seek legal assistance in the prosecution of the challenge was neither gratuitous nor whimsical.

As noted above, Title IV of the LMRDA requires that the complaining union member exhaust internal remedies before complaining to the Secretary of Labor. But even after those procedures have been pursued, the Secretary is dependent upon the substance of the union member's complaint to the union.

During the seven-day period after he agreed to aid Sadlowski, Despres examined the USWA constitution and procedures, and the applicable legal authorities. He interviewed Sadlowski and numerous witnesses, and assisted Sadlowski in interviewing still other witnesses. He prepared affidavits and statements, and gathered documents. Sadlowski submitted his protest of the election to the USWA International Tellers on February 23, 1973. During the month between submission of his protest and the date which had been set for hearing, Despres continued to supervise efforts to obtain evidence for the hearing, and prepared materials for Sadlowski to utilize at the hearing (which Despres was not permitted to attend).

When the International Tellers upheld the result of the disputed election, and Sadlowski decided to contest their decision, Despres aided him in exhausting internal union remedies through assistance in his appeal to the International Executive Board. Sadlowski appeared before that body, presided over by USWA President I. W. Abel (who had previously campaigned for Evett). Despres was not permitted to accompany Sadlowski at the Executive Board hearing.

When the International Tellers report was upheld by the Union leadership, Sadlowski resolved to complain to the Secretary pursuant to 29 U.S.C. § 482(a), requiring that a complaint be filed within 30 days of exhaustion of union remedies leading to denial of relief. In preparation, Despres interviewed witnesses to obtain statements and conferred with Sadlowski for the purpose of preparing materials to be filed with the Department of Labor in order to induce the Secretary to challenge the election. Despres assisted Sadlowski in the preparation of a brief and argument for the Secretary of Labor, which accompanied the actual complaint filed with the Secretary. The materials and complaint presented to the Secretary totalled nearly 100 pages.

Under these circumstances, the Department of Labor relied almost exclusively upon Sadlowski's charges in conducting its investigation. The compliance officer in charge of the investigation noted that in making its inquiry the Department concentrated upon those locals at whch Sadlowski alleged the most egregious violations to have occurred. Sadlowski's allegations were borne out by the Department's own investigation.

Nevertheless, the Department did not bring suit within the 60 day period required by statute, and instead agreed with the USWA in both July and August of 1973 to extensions of time within which any action might be brought. Sadlowski and Despres became understandably apprehensive about the Department inaction, in view of findings by Department investigators of wrong-doing. Concerned about the prospect of further delay, they agreed that Sadlowski should seek the assistance of a Washington, D.C. attorney, Joseph Rauh, Jr., experienced in LMRDA proceedings. Rauh agreed to assist Sadlowski and Despres.

Shortly after Rauh was retained, the Department of Labor agreed to the further extension of the time for bringing any action until November 1973. Rauh immediately protested the extension to the Department, and no further extensions were granted. Rauh familiarized himself with the election and informed the Deputy Assistant Secretary of Labor of the nature and degree of the violations which had occurred. Rauh also indicated his intention to bring suit to set aside the arbitrary inaction of the Secretary if suit were not instituted by November. *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). The Secretary did institute suit challenging the District 31 election, on November 8, 1973. Sadlowski's counsel thereupon assisted him in intervening in the Secretary's action and obtaining the aid of local counsel from Washington, Pennsylvania, Kenneth Yablonski. Upon the granting of intervention Sadlowski and his counsel enlisted the aid of a younger New York attorney, Judith Schneider, to assist in the considerable task of gathering and presenting evidence.

Although the suit had been filed in November 1973, and despite Congress' apparent intention that such suits be expedited, the first significant step in prosecution of the action occurred after Sadlowski's intervention in January 1974, and a February 1974 meeting with Department of Labor officials at which Sadlowski's attorneys urged prompt action in the case. The Department officials informed Sadlowski's attorneys at the meeting that the latter could be of valuable assistance to the Department in following up leads and in providing information relevant to the prosecution of the case. The USWA finally filed its answer to the complaints, and the Department, armed with information provided by Sadlowski's attorneys and at their urging, took its first step toward discovery: the service on the USWA of a request to produce documents. The Department also filed a motion for expedited trial and to fix the discovery calendar, which Sadlowski's attorneys supported by an extensive memorandum urging a prompt resolution of the case. In response, the USWA asserted that it would be difficult to begin discovery until August 1974.

The district court conducted a hearing on the Department's motion on March 21, 1974, and was critical of the delays both in the Department's filing of the complaint, and in the USWA's filing of its answers. Counsel for both the Department of Labor and the USWA indicated that they had tentatively agreed that discovery could begin as late as August of 1974. Sadlowski's attorneys opposed such a schedule and urged that discovery should begin immediately and be completed as soon as possible. Accepting the recommendation of Sadlowski's attorneys, the district court ordered that discovery be completed within 90 days.

Nevertheless, the only Department of Labor discovery which took place within that 90-day period turned out to be the April 1974 service of interrogatories on the USWA. Also in April, Sadlowski's attorneys were advised that settlement negotiations were taking place between the Department and the USWA. A Department official informed Sadlowski's counsel that the Department was considering USWA proposals to divide District 31 into two parts (Illinois and Indiana), and another proposal to conduct a new election, but with a reopening of nominations. Sadlowski's attorneys strongly protested these proposals.[9] The ultimate settlement agreed to by the Department did not include either proposal.

In early May 1974, Sadlowski's attorneys were advised by the Department of Labor Regional Solicitor in Chicago that he believed continued efforts by Sadlowski would materially aid in securing USWA capitulation and agreement to a new election. Also, a Department lawyer in Philadelphia told Sadlowski's lawyers that Department investigation would proceed no further. Sadlowski's counsel thereupon continued their own investigation into the improprieties in the original election, particularly into ballot frauds by local union officials, and the use of union funds for Evett's campaign. Among other activities, Sadlowski's attorneys took the depositions of Evett, and his campaign manager. They also noticed the depositions of presidents of local unions within District 31 where considerable evidence of ballot fraud was found; there were allegations of involvement by Evett's staff in those instances. In at least one local, the membership had imposed fines and suspension upon its president and tellers for vote fraud. An International Commission of USWA officials later recommended that the fines and suspensions be lifted. Sadlowski's attorneys protested this action in a telegram to the International Executive Board, which decided to reject the recommendation.

---

[9] The proposal to change Sadlowski's elective base seems clearly prejudicial, as might be any additional nominations which would divert some of Sadlowski's support.

When the Department sought Sadlowski's consent to the proposed settlement agreement, in July 1974, Sadlowski's attorneys proposed changes in the settlement calculated to assure a fair election. They moved for a hearing on the Department/USWA motion for approval of the settlement, at which the suggested amendments were presented to the district court. But while urging the court to exercise its power to assure fair terms for a new election, Sadlowski's attorneys indicated that any new election, however unfair, would be preferable to further delays. Sadlowski's attorneys were successful in achieving a stipulation that there would be no changes in the boundaries of District 31, as had previously been suggested by the Department and USWA, and they convinced the court that the new election should be held before November 19, 1974, as opposed to the November 29 date proposed in the agreement—which fell on Thanksgiving weekend and might well have resulted in a small turnout for the new election. In addition, Sadlowski's attorneys argued their case against a mail ballot, the use of which was ultimately abandoned by the Department.

At the same August 29, 1974 hearing the district court also made it clear that it expected Sadlowski to forward a plan for a fair election to the Department of Labor, and his counsel did forward to the Secretary an extensive application seeking orders which would insure a fair election. The Department of Labor indicated, in October 1974, the actions it had taken in response to Sadlowski's requests, and stated that it had gained the USWA's agreement to abandon the mail ballot in favor of on-site voting in the new election. The Department also required that certain staff contributions of time and money to union-backed candidates be circumscribed and carefully controlled, and that records of such contributions be maintained. In direct response to Sadlowski's request, the Department also agreed to issue an order forbidding union staff members from campaigning on union time or utilizing union facilities for campaigning. The Department also decided to order the USWA to prepare certain lists of information relating to the various locals within District 31, and to provide such information to all candidates, including Sadlowski. The record makes clear that the impetus for many of these actions was Sadlowski's urging.

As a result of further prodding, the Department of Labor held a pre-election conference in Chicago. Sadlowski's counsel succeeded in proposing and embodying numerous provisions in the rules for the upcoming election, including: a provision for custody of ballots in and accrediting of election observers by the Department of Labor; a provision requiring that the election supervisor be given the identity and addresses of various worksites (and that the same be given to Sadlowski as well); a provision for record-keeping as to contributions by staff representatives of the USWA to candidates in the election. Sadlowski's counsel later persuaded the Department to send a letter with the election rules to the effect that campaigning on union time by union staff employees was improper.

The Department of Labor also agreed with the suggestion of Sadlowski's counsel that observers be permitted at the sites to assist the Department in monitoring the election, and conceded that it alone could not enforce the election and campaigning rules. The Department therefore encouraged the filing of compaints relating to election violations, and Sadlowski's attorneys undertook to assist the Department in enforcing those rules and insuring a fair election. Sadlowski's counsel were also active in widely disseminating the rules, and encouraging union members to report violations, and they pinpointed particularly problematic procedures, and problem locals. At their urging, the Department implemented systems designed to speed the checking of voter eligibility and avoid voting card fraud and delays from too few voting lines. The final Department of Labor figures for the election were: Sadlowski 39,637 and Evett 20,158. By the time of the election, Evett had held the disputed position for over a year and one-half.

This detailed recapitulation of the actions undertaken by Sadlowski's attorneys is not in any sense intended to denigrate or detract from the enormous effort which the Department of Labor devoted to the prosecution of the violations and the conduct of a fair election. The record makes clear the many thousands of man-hours which the Department spent on this case, and we do not suggest that they were other than conscientiously and profitably expended. However, we disagree with the district court characterization of the efforts of intervenor Sadlowski's counsel as "self-serving and at the most a mere fraction of and duplicitous of the work entrusted to the Secretary by the Congress." *Brennan v. United Steelworkers of America, District 31, Sadlowski, Intervenor,* Civil Action No. 73–957 (W.D.Pa. December 11, 1975), reproduced in appendix at 201a–207a. As the survey above suggests, an intervenor can fulfill many functions, and the better the lawyers involved the better this scheme will function. As *Local 639* indicates:

> "As the Secretary's determination to take no position on this issue [of the propriety of an award of attorney's fees] suggests, allowance of attorney's fees for union member efforts in aid of the Secretary's action does not undercut the exclusivity of the administrative remedy. 'Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aid of Title IV.' *Wirtz v. Local 153, Glass Bottle Blowers,* 389, U.S. 463, 88 S.Ct. 643, 19 L.Ed.2d 705 (1968)."

543 F.2d at 385–86. The agency and the intervenor perform truly different roles, with, in our view, considerably less overlap and waste than the district court found. The Department of Labor performs a quasi-judicial, rather than a purely adversarial role in Title IV cases. Its duty is to the public, its own policies, the union interest, and the individual. In deciding whether to institute suit, what to complain of, and what to settle for, the Secretary must constantly weigh competing interests and duties. Before the *Trbovich*-intervenor existed, the statutory scheme involved only one party truly comporting itself in an adversarial posture: the union. But since *Trbovich* the "union interest" is defined by two parties with adverse viewpoints—even if their

interest in the union remains a common denominator. The Secretary, in this circumstance, occupies a more tenable position since he has not only his own expertise in the field, but, in addition, the benefit of the crystallization and presentation of issues and viewpoints we associate with the adversary process. The intervenor's role created by *Trbovich* is thus that of an adversary to the union in developing the facts and the legal issues. What the issue of statutory preclusion of the exercise of equitable powers boils down to in this context is the question of how empty a role the Supreme Court intended to create. Considering the complexities of internal union remedies, complaint to the Secretary, and recourse to the courts, and the penalties for lack of legal or technical sophistication, we cannot believe that intervenors were intended to proceed *pro se.* To have anticipated the depth and quality of involvement, expertise, and enterprise shown by Despres, Rauh, Yablonski and Schneider for a fee which the USWA would have the courts find themselves powerless to award would be to deny *Trbovich* all effect. While we do not consider the propriety of an award of attorney's fees for union member assistance in pursuing Title IV violations where suit is not brought or the complainant does not intervene, we note that courts and legislatures do not ordinarily create roles—strong roles— and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively. Nothing has been suggested to us which indicates that the Secretary's role could be or has been threatened by Sadlowski's attorneys, and it is difficult to imagine more vigorous or skillful action. Nothing in either the statute or the legislative history of the LMRDA suggests to us the preclusion of the courts' traditional equitable power to provide complete relief in light of the statutory purpose.

We hold that an award of equitable relief is wholly consistent with Title IV of the LMRDA. Our consideration of the basis for such an award in this case, "common benefit," follows.

III. "COMMON BENEFIT"

Although the traditional American rule disfavors the award of attorney's fees in the absence of statutory or contractual authorization, the federal courts have the inherent power to fashion such equitable relief, payable by those enjoying a common benefit, under certain circumstances, *see, Hall v. Cole,* 412 U.S. at 4–5, 93 S.Ct 1943; *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), and have not hesitated to use this power where "overriding considerations indicate the need for such a recovery," *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–92, 90 S.Ct. 616, 625, 24 L.Ed.2d 593 (1970); *see Fleischmann,* 386 U.S. at 718, 87 S.Ct. 1404. The courts have been particularly sensitive to the need and desirability of the allowance of attorney's fees in cases where a plaintiff's prosecution of an action confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them," *Mills,* 396 U.S. at 393–94, 90 S.Ct. at 626. In such cases, "fee-shifting" has been deemed appropriate because "to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* at 392, 90 S.Ct. at 625; *Hall v. Cole,* 412 U.S. at 6, 93 S.Ct. 1943. The vitality of this "common benefit" exception has been affirmed recently by the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society,* 412 U.S. 240, 257–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

As the *Alyeska* Court stated, the roots of this exception lie in "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorney's fees from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed." Id. at 257–58, 95 S.Ct. at 1621, citing *Trustees v. Greenough,*

105 U.S. 527, 26 L.Ed. 1157 (1882). As pointed out by Judge Leventhal in *Local 639*, 543 F.2d at 382–83:

"This 'historic power of equity,' essentially an application of the court's power when seized of jurisdiction over a case to award complete relief so as to prevent unjust enrichment, has developed well beyond the 'common fund' limitation of *Greenough.* In *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), the Court recognized power in the district court to reimburse a plaintiff's litigation expenses even though she sued for her own benefit and not for a class, because her success would by operation of stare decisis entitle others to recover out of the same assets. There is no prerequisite of pecuniary benefit, as was made clear by *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 392–94, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), a case involving a judicially implied right of action under the Securities Exchange Act of 1934 to challenge materially false or misleading proxy solicitation.[29] *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), extends *Mills* to an express statutory cause of action.

"This development remains undisturbed after *Alyseka* because the 'common benefit' rational was not involved in that case.[30] and the Court made clear that 'Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney fees.' 421 U.S. at 259–60, 95 S.Ct. at 1623. *See also F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129–30 & n. 18, 94 S.Ct. 2157, 40 L.Ed2d 703 (1974).[31]

---

[29] Mills permits 'depart[ures] further from the traditional metes and bounds of the [common fund] doctrine' where 'litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs among them.' 396 U.S. at 393–94, 90 S.Ct. at 626.

[30] See 421 U.S. at 245, 259–60, S.Ct. 1612, noting that this court's decision in *Alyeska* disclaimed reliance on the traditional equitable exceptions of 'common benefit' and 'bad faith.' *Wilderness Society v. Morton,* 161 U.S. App.D.C. 446, 449, 495 F.2d 1026, 1029 (en banc, 1974).

[31] For examples of post-*Alyeska* 'common benefit' decisions, *see National Treasury Employees v. Nixon,* 172 U.S. App.D.C. 217, 521 F.2d 317 (1975) (mandamus action to require the President to grant pay adjustments required by statute); *Swanson v. American Consumer Indus., Inc.,* 517 F.2d 555 (7th Cir. 1975) (stockholder derivative suit and class action); *Harrison v. United Transp. Union,* 530 F.2d 558 (4th Cir. 1975) (suit by railroad conductor against union for breach of duty of fair representation).

> "The issue here is whether the 'common benefit' rationale may be applied to the case of union member intervention in a suit brought by the Secretary to enforce electoral rights and maintain the integrity of a union election. The appropriateness of 'fee-shifting' in the union democracy context suggests an affirmative answer, unless Congress can be said to have evidenced a purpose to bar the award of such fees."

Mills, supra, makes clear that the "fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this [common benefit] rationale," 396 U.S. at 392, 90 S.Ct. at 625—despite the fact that the early cases based recovery upon the production or preservation of a "common fund." However, *Mills* involved a judicially implied right of action under the Securities Exchange Act of 1934 to challenge materially false or misleading proxy solicitation, and *Hall v. Cole* provides the connecting link to this case, since it extended *Mills* to a statutorily created cause of action under the LMRDA.

Alyeska has no effect on the development or application of the "common benefit" exception, since it was not an element of that case, and, as the Supreme Court stated: "Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney's fees," 421 U.S. at 259–60. 95 S.Ct. at 1623.

As Judge Leventhal recognized in *Local 639:*

> "With respect to LMRDA, the courts have uniformly applied a 'common benefit' analysis to award attorney's fees to private litigants. The Supreme Court in *Hall v. Cole,* . . . endorsing earlier decisions of the Third Circuit [*Gartner v. Soloner,* 384 F.2d 348 (3d Cir. 1967), *cert. denied,* 390 U.S. 1040, 88 S.Ct. 1633, 20 L.Ed.2d 302 (1968)] and this court, held that attorney's fees may be awarded for suits brought to enforce the 'Bill of Rights' guarantees of Title I of LMRDA. This court's decision permitted the recovery of attorney's fees for a suit under Title V, which places union officials under federally defined fiduciary obligations. *Bakery & Confectionery Workers Int'l Union v. Ratner,* 118 U.S.App.D.C. 269, 335 F.2d 691 (1964). *Ratner* was extended by this court to a suit brought under section 401(c), the only privately enforceable provision in Title IV. *Yablonski v. United Mine Workers,* 151 U.S. App.D.C. 253, 466, F.2d 424 (1972), *cert. denied,* 412 U.S. 918, 93 S.Ct. 2729, 37 L.Ed.2d 144 (1937). And, recently, the Fifth Circuit applied the reasoning of these decisions to a suit brought under Title III, which regulates union trusteeships, a provision enforceable by either the Secretary or union members directly. *McDonald v. Oliver,* 525 F.2d 1217 (5th Cir. 1976).
>
> "Significantly, in none of these decisions was there a statutory provision that expressly authorized the award made. Rather, the governing rationale was that union members by bringing suits against their union help vindicate the statutory policy in favor of union democracy which necessarily redounds to the benefit of the entire membership." [footnotes omitted.]

543 F.2d 382–83. We have no doubt that this statute was intended to provide union members with protection from the type of attempts to thwart the wishes of union members and impair union democracy which appear to have occurred in this case. The dissent makes the remarkable statement (page [50a]) that no proof is cited for the facts stated in this opinion, in spite of repeated references in this opinion (see pp. [5a, 25a–30a, 37a]) to the unchallenged and uncontradicted Verified Application for Attorneys' Fees (89a–146a). We note that the Verified Application contained undenied statements that Sadlowski's opponent was supported by the union leadership (see 90a, citing Abel Deposition at 5–7,

and note 2 above);[9a] that union staff members were instructed to contribute to the Evett campaign in specified

---

[9a] The transcript of the Deposition of I. W. Abel, President of the USWA, Document No. 62B in Civil No. 73–0957B (W.D. Pa), contains the following at 4, 5–7, 9–10, 31–33, 36–37:

"Q. [Mr. Rauh] So that the post of district director of District 31 as the largest is a very important post in your union?

A. [Mr. Abel] *Yes*, under our constitution, the officers have an equal vote with the board member of the largest district. [Emphasis supplied.]

* * * * *

Q. Well, there did come a time prior to the February, '73 election when you did decide to support Mr. Evett, did you not?

A. Oh, yes. Yes. Maybe, to make it clear, maybe make it so that you won't have to ask a lot of questions, we have, well, since—I was going to say since '65, and that would be a good figure, but pretty much from the beginning of the election of officers of this union, the official family pretty much supports each other, you know, and I think this has been the case up until—well, as an example, when Phil died and I became secretary-treasurer, the Board designated me as the McDonald successor, and then almost without any indications, everybody went out and supported my candidacy and supported Dave for president.

* * * * *

Q. Mr. Abel, would you sort of elaborate on official family? Did you mean the three international officers plus the district directors?

A. District directors.

Q. That would be what you would consider?

A. Right.

* * * * *

A. Starting, again, in our campaign in '65, we set up our own little political organization, so to speak. We designated Joe Germano as our chairman, Alex Fuller as our secretary and Tom Murray, who was then with us as assistant to the secretary-treasurer, as the treasurer of our group and this organization was designed to raise funds and direct the campaign.

Q. This would be the campaign of the official family, would that be fair?

A. In '65, yes, . . .

* * * * *

[9a] (continued)

A. Yes. Well, then, when we came up this last time, Murray had retired and Germano was retiring and so was Joe Molony, so we made Germano and Molony as co-chairmen. We made Harry Guenther, who succeeded Tom Murray, as the treasurer and Alex Fuller continues to be the secretary of the group.

Now, here again, they engaged the assistance and services of people to run a campaign, and I assume that letter was put together by them, and in this instance sent to the membership in District 31.

When there was a contest in other areas, I suppose a similar letter was sent out. I don't know, but I assume that.

* * * * *

A. Well, all that I have had anything to do with is in the way of financial assistance, in line with what we have always done.

* * * * *

A. Well, I made a contribution, as an example.

Q. You have made a contribution to Steelworkers for Continued Leadership this year?

A. Right. Right. Yes.

* * * * *

Q. That is since the new election—

A. Oh, yes.

Q. —was agreed to?

A. Yes.

Q. And how much was that?

A. Five hundred dollars by personal check.

Q. I think in addition to that you said you had talked about financial assistance for Mr. Evett. How was that to be obtained, other than your check, sir?

A. Well, the normal procedure, and I assume that's the procedure being followed at the present time, while I am not clear that it is, that each director will make a contribution, perhaps some won't, I don't know, but assume they will, and assume that in most cases the directors will talk to their staff people and others about making a contribution, too.

Q. Now, do you know of any place where that has already occurred?

A. Well, I talked to Lynn Williams, our director from District 6 in Canada, who was in the other day, and he told me he was raising some money.

Now, he didn't go into the amount or how. I'm told that various of our directors have talked to their staff. In one amounts[9b] and campaigned for Evett on union time and using union facilities, even to the point of neglecting union duties (see 112a); that during the first election union officials refused to inform Sadlowski of the locations of work sites and polling places so that he was limited in placing

---

[9a] (continued)

case, over in Youngstown, I believe it is, that the director has given out a copy of a letter that Harry Guenther sent out to the directors, recommending that contributions be made and recommending, I think, in cases of directors a $500 contribution, and in case of staff people, a solicitation of $50, something like that.

* * * * *

Q. . . . Would you just tell me if you said the following: Did you say you were supporting Evett?

A. I don't think so, and I wouldn't know that there would be any need for it. They have known that from the last election.

Q. Did you say that Mr. Sadlowski could win and the staff should get out and hustle for Evett?

A. As I say, I don't recall, but I don't listen to myself, as I told you.

I would assume that anybody would say that Sadlowski can win. Any candidate can win, as you and I know from our political experiences.

Q. Well, I'm asking another question. Did you say that, quote, the staff should get get out and hustle for Evett?

A. No. I think I said that the staff should assume their responsibility of leadership. I stressed leadership in that meeting that I am aware of, both at the convention as well as the district level, and the importance of seeing to it that their local unions not only participated in the election but did it properly."

[9b] The Verified Application contains this language at 112a:

"Harry Guenther, Assistant to the International Secretary-Treasurer, testifying that the official fund-raising arm of the International Union was seeking money for Evett—the 'suggested' amount was $500 per Executive Board member and $50 from each staff representative and 'a further request might be necessary.' The nature of this appeal, communicated to all District Directors is such that at least one Director called a special meeting to distribute copies of the 'suggestion' in envelopes marked 'confidential.' "

observers at the polls (see 90a); that Department of Labor investigators found the "very serious violation" of lack of secrecy in the voting at many locals (see 95a); that Sadlowski received widespread reports of ballot frauds, illegal electioneering, deprivation of secret ballot, interference with observers, and other LMRDA violations (see 90a); that the Secretary found basis for a charge in his complaint that moneys received by way of dues, assessments or similar levies were applied to promote the candidacy of Samuel Evett (see 104a, including note 33; *see also* ¶ XIII of Complaint filed on November 8, 1973, by the Secretary as Document No. 1 in Civil Action No. 73-0957 (W.D.Pa.)); and that in Local 1066 the tellers had been found guilty of vote fraud.[10] L. W. Abel, President of the USWA, testified as

---

[10] See pages 17-19 (105a-107a) of the Verified Application for Attorneys' Fees, where this language appears:

"In June, 1974 Intervenor decided to take the depositions of Stanley A. Lichon and Danny Cifalia. At the time of the February 13, 1973 election they were presidents of locals in which the Department of Labor had found considerable evidence of ballot fraud.[34] There were allegations of Evett's staff involvement in both cases. In addition, in the case of Cifalia's local 1066, actions taken by the USWA had created the inference that a cover-up of the involvement of employees of the International Union in massive ballot fraud was in progress. The USWA made strenuous efforts to prevent the questioning of Lichon and Cifalia. The official announcement of the Union's capitulation came during the delayed taking of Lichon's deposition on July 12, 1974 and while Cifalia was still being kept from questioning.

[34] Lichon is the president of local 7610 and was the chief teller in the contested election. In his complaint to the International Tellers Sadlowski had charged fraud in 7610. He had supplied the Tellers with the signed statements of 44 members of that local who said they voted for Sadlowski. In the official tally Sadlowski received 22, Evett was credited with 215.

Cifalia was the president and chief teller of local 1066. Shortly after the contested election he was appointed a staff representative. (He resigned after the local membership found him guilty of vote fraud in the contested election). In that election the official tally was Evett 935, Sadlowski 239. Admissions from the prepetrators of the fraud demonfollows in a deposition (Document No. 62B in Civil No. 73-0957B (W.D.Pa.), at page 38):

> "Q. [Mr. Rauh] And you feel, Mr. Sadlowski shouldn't have gone to the government even though there was ballot box stuffing, Mr. Abel?
>
> "A. [Mr. Abel] Correct, Correct."

The Verified Application also alleges the following at 116a:

> "The USWA has not been a neutral party in these proceedings. Evett was the candidate of the 'official family'—the Administration of the USWA. Abel Deposition, pp. 5–7. During the pre-election conference the views of Evett and the USWA never diverged.
>
> * * * * *
>
> "In the 1973 election there were numerous instances of double shipments of ballots and unaccounted-for ballots."

No counter-affidavit was filed by the USWA challenging or contradicting the sworn allegations of the above Verified Application for Attorneys' Fees. The union filed a Motion to Dismiss such application, stating, *inter alia,* at 147a–148a:

> "As a matter of law, the aforementioned Application fails to state a proper claim for attorneys' fees and therefore should be dismissed on its face. Since such a dismissal would obviate the need for massive discovery and an evidentiary hearing on said Application, USWA respectfully suggests that discovery not be commenced pending disposition of this Motion."

In *Kahan v. Rosenstiel,* 424 F.2d 161, 164 (3d Cir.), *cert. denied sub nom. Glen Alden Corp. v. Kahan,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970), this court said: "[b]ecause the District Court disposed of the matter on a motion to dismiss, the facts alleged in plaintiff's petition for counsel fees and his amended complaint in the underlying suit must be accepted as true."[10*] It is clear that the USWA was in the best position to deny the above and other allegations of the Verified Application for Attorneys' Fees and the depositions, if they could have done so. USWA elected not to challenge the Verified Application and to file its Motion to Dismiss. This Court has recently reaffirmed the rule applicable to this situation:

> "Under such circumstances, we must take all of the well pleaded allegations of the complaint as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to any relief.[4]
>
> [4] *See, e. g., Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Polite v. Diehl,* 507 F.2d 119, 124 n.2 (3d Cir. 1974); *Quinones v. United States,* 492 F.2d 1269, 1273 (3d Cir. 1974); *Curtis v. Everette,* 489 F.2d 516 (3d Cir. 1973), *cert. denied,* 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974); *Melo-Sonics Corp. v. Cropp,* 342 F.2d 856 (3d Cir. 1965)."

Helstoski v. Goldstein, 552 F.2d 564 at page 565 (3d Cir. 1977). In view of the facts in this record, the following language in *Local 639* is particularly applicable:

> "The statute is expressly aimed at protecting union

---

strated that the names of 600–700 members had been forged and the ballot box stuffed with Evett votes. Lehman Deposition pp. 79–93.

"The membership of local 1066 had imposed fines, including restitution of $3,996.38 for election expense, and suspensions, upon Cifalia and four other tellers found guilty of vote fraud.

* * * * *

"Thus, by virtue of actions taken by Intervenor's counsel, the USWA Board meeting on July 9, 1974 was faced with a substantiated charge of attempted cover-up of illegal activities and a demand for depositions of two local union presidents who, according to Intervenor's evidence, engaged in unlawful conduct under the prodding of USWA staff representatives, as well as substantiated charges of illegal use of union funds. At that meeting, the board decided to capitulate."

[10*] *See also,* for example, F.R.Civ.P. 56(e), contemplating that a party must respond to affidavits of his adversary setting forth by affidavits, depositions, etc., "specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

> members from the corruption and electoral unresponsiveness of their leadership. 'Fee-shifting' is particularly appropriate because of the close match between the party assessed and the beneficiary of the litigation. Indeed, the benefited class, its contours shaped by the union's self-description and its finances based on per capita payments, fits the paradigm for 'common benefit' cases."

543 F.2d at 383. And we hold that absent congressional circumscription of the court's power to award equitable relief in the form of "fee-shifting," the allowance of attorney's fees is justified under Title IV when a "common benefit" has been conferred.

The overriding considerations in evaluation of "common benefit" claims are: whether the benefits may be traced with some accuracy; whether the class of beneficiaries is readily identifiable; and whether there is a resonable basis for confidence that the costs may be shifted with some precision to those benefiting.

The district court, adopting the Magistrate's Report,[11] held that even though the intervenor argued that his actions vindicated the interests of all union members in securing free elections, "it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole." And the Magistrate went on to say that even if the latter proposition were true, "Congress has ascribed the task of insuring the propriety of union elections to the Secretary. The individual may only seek to vindicate his own limited personal interest." We have concluded that the district court incorrectly found that no common benefit was conferred upon the USWA as a whole, and improperly denied Sadlowski's application for assessment of attorney's fees against the Union treasury.

The *Hall* Court, after recognizing that Congress enacted the LMRDA to insure minimum standards of democratic process and stem abuses which included breach of trust,

---

[11] *But see* pages [35a–37a] and note 13 *infra.*

corruption, and disregard of the rights of individual employees, stated that by vindicating his own right to free speech under Title I:

> "the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the results achieved but in their implications for the future conduct of the union's affairs.' *Yablonski v. United Mine Workers of America,* 151 U.S.App.D.C. 253, 466 F.2d 424, 431 (1972). Thus, as in *Mills*, reimbursement of respondent's attorney's fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefitted from them and that would have to pay them had it brought the suit.'" [Footnote omittted.]

412 U.S. at 8–9, 93 S.Ct. at 1948. *Hall*, then, makes clear that to the extent that prosecution of LMRDA violations supports union democracy, such activity confers direct and substantial benefit upon the entire union membership. In our view, the entire thrust and effect of Sadlowski's prosecution of these Title IV violations was vindication of democratic process in USWA elections, and his actions redounded to the common benefit of the whole Union. Title IV is specifically aimed at remedying interferences with union elections like those which occurred here. In this regard we note the particularly egregious abuses of the electoral process in this case. Sadlowski was not merely opposed by a member of the USWA "official family," Union officers and agents actively campaigned against him. The depth of Sadlowski's favor with the rank and file of District 31 is evident from the fact that when a fair election was finally held, votes ran nearly two-to-one in his favor. Union leadership having exerted such effort to oppose the candidacy of a single insurgent, it would be naive to assume that similar election "irregularities" have not or would not spread to other districts and locals where a member of the "official family" ran opposed. Had such tactics been successful in District 31, there appears to be little doubt that they would have been employed again, and again. The determination

and vigor of this union member served to insure to all union members the rights which Congress intended be theirs, and in this instance union democracy would have been a hollow promise without Sadlowski's involvement. The mere fact that Sadlowski himself benefited from his prosecution of this action neither negates the benefit to the union nor prejudices his right to claim attorney's fees. *Hall, id.*

Sadlowski's contribution to the "common benefit" of the USWA membership is not, however, limited to vindication of union democracy. The directors of the various Union districts serve on the International Executive Board: the USWA's governing body. Interference with the election of the District 31 director cannot be said to have merely localized impact on the union membership. Despite the fact that the main function of a district director is to represent a district, each director also plays a significant role in representing the interests of *every* union member. The International Executive Board is charged with enforcing the Union constitution, directing the affairs of the International, and overseeing the financial affairs of the Union. The International Executive Board also plays an important internal political function, since it decides when elections will be held, and also establishes the territorial boundaries of the various union districts.

The magistrate and the district court were, however, concerned about other elements of the "common benefit" determination as well. The *Alyeska* Court did state that in the Supreme Court's "common-fund and common-benefit decisions, the classes of beneficiaries were small in number." 421 U.S. at 265 n.39, 95 S.Ct. at 1625. The magistrate apparently understood that language to mean absolute numbers, and indicated that a class of 1,400,000 was too large to have been benefited. Like any other statement, that one must be viewed in context. Given this context, mere size does not support the contention that the class of USWA members did not receive a common benefit from Sadlowski's activity. *Mills*, for example, involved a beneficiary class of 8,987, 403 F.2d 429, 432 (7th Cir. 1968). *Hall v. Cole, supra,*

involved a class of approximately 85,000 union members, and *Yablonski v. United Mine Workers of America, supra,* involved a class of approximately 250,000. In our view, the requirement of identifiability weighs heavily in this determination, and USWA members, though numerous, are readily identifiable as the benefited group. The Supreme Court no doubt wished to clarify the notion that although very much larger groups might be said to benefit from the prosecution of certain actions—just as every union member, and every individual might be said to benefit from vindication of union democracy—the doctrine is not to be extended to ludicrous dimensions.

The magistrate also erred in holding that attorney's fees would unfairly burden all Union members since, in its view, the primary benefit fell to District 31, while the USWA treasury supported by 1,400,000 members would be the source of payment. This record requires the determination that the entire Union membership benefited from Sadlowski's tenacious handling of this suit, and we note that the benefit conferred in this case may well justify whatever "burden" is involved. But we would point out, again, that in this case the so-called "burden," and its size, were in large part attributable to the USWA defense of a meritless position. The very purpose of the exhaustion requirement of Title IV is to give the union the opportunity to correct irregularities. Where the union faithfully performs its obligation to obey the LMRDA mandate, neither complainant nor union would require much legal assistance. Here, improper attempts to oppose Sadlowski directly created the need for legal assistance, and the tenacity of this opposition contributed directly to the size of "burden." While we fully agree that, in view of the extreme abuses which occurred, almost all the expenses for legal services incurred by all parties were wasteful and should never have been necessary, there is no reason to penalize the intervenor who performed his function correctly and well. If the rank and file is dissatisfied, their recourse lies with the Union leaders who were responsible. The position that the USWA treasury is an improper fund from which to make an award, since the primary benefit was to District 31, fails for like reasons.[12] While it cannot be denied that the *greatest* benefit was conferred upon Union members in that district, we note that suit was brought against the USWA, rather than District 31, precisely because districts are not labor organizations within the meaning of 29 U.S.C. § 402(i), and the parent union is the suable entity. There is, moreover, no district treasury, since all dues and fees are contributed directly to the USWA and later some funds are dispersed to the districts. To hold that attorney's fees must be recovered from a fund created by those who received the greatest benefit, rather than from a fund created by those who received a legally sufficient and significant benefit, would be tantamount to denial of that recovery. But more than that, such a holding would effectively allow unions to insulate themselves from union member attempts to prosecute Title IV violations. By creating an internal structure that comingles funds and denies their identifiability to an individual unit, unions could preclude recovery of attorney's fees. Such action would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich*.

We note that although the district court specifically adopted the magistrate's report, the sweeping conclusions of law which are contained in its Memorandum (see note 1 above) appear to differ from the more completely reasoned approach of the magistrate.[13] Our particular concern in this case is the failure of the district court to make clear the basis for its decision. Because of the inconsistencies between the report of the magistrate and the Memorandum of the district court, we are unable to determine the extent to which it relied on the reasoning of the United States Magistrate in reaching its decision, as opposed to its reliance on the sweeping legal conclusions quoted in note 1 above. We have concluded that those legal conclusions of the district court are an improper basis for decision on this record.

We believe that a case involving public policy considerations of the great importance of those concerned here requires a reasoned statement by the district court of the exact basis for its determinations on the specific record before it. For example, we do not know whether specific consideration was given by the district court to the serious allegations of fraud in the elective process to which we have referred at [26a–29a], note 10, or whether the hearing judge considered that irrespective of outrageously fraudulent and corrupt elective processes, a defeated candidate for high union office could never recover attorneys' fees solely because District 31 members received more benefit than the general union membership.[14] We reject such a basis for the district court's December 11, 1975 Order.

---

[12] The fact that the Secretary of Labor brought suit against the local in *Local 639*, rather than the international, as here, does not suggest that the District of Columbia Circuit would have found differently had suit been brought against the entire union, particularly in view of the union structure in this case, discussed below.

[13] For example, where the magistrate recognized the concept enunciated in *Mills* and *Hall*, that attorneys' fees may be recoverable when a common benefit has been conferred, even though no fund or property is recovered (176a), the district court did not (206a and note 1 above); where the magistrate felt that an award based upon the common benefit theory was inappropriate on the facts of this case because of the greater benefit conferred upon District 31 and the burden such fees would place on the union as a whole, the district court found "no support in fact or in law for the grant of counsel fees in a suit brought under the general provisions of Title IV" (203a); and where the magistrate stated that "[t]he acts of counsel for the intervenor in many respects duplicated the efforts of the Secretary" (184a), the district court held that "any independent investigation which the intervenor might have undertaken was voluntary and self-serving and at the most a mere fraction of and duplicitous of the work entrusted to the Secretary by Congress" (204a)—a statement contrary even to the position taken by the Secretary in his Response . . . to Application for Attorneys' Fees, filed March 7, 1975. *See* Doc.No. 78B in Civil Action No. 73–0957B (W.D.Pa) where the Secretary conceded, at pages 2–3, that:

> "Without attempting to detract from the efforts of counsel for intervenor, it must be pointed out that it is quite customary for the Departments investigators to receive assistance from the complainant in the conduct of their investigation of an election. . . . Indeed it is self-evident that the major part of the leads pursued by the investigators in such an investigation derive from the complainant's allegations."

The second quotation from the district court Memorandum, at note 1, appears to overlook completely the holding of the Supreme Court of the United States in *Mills, supra,* that the absence of a "fund or property" does not preclude the application of the common benefit rationale. See page [24a] above.[15]

The facts of this case illustrate graphically the abuses of power which the LMRDA was enacted to prevent. The Union hierarchy, rather than remaining neutral and maintaining the integrity of the electoral process, closed ranks around its own candidate to prevent an independent contender from gaining a foothold. The vigorous campaign for vindication of congressionally created rights mounted by this intervenor appears to have conferred a "common benefit" upon the USWA as a whole.

In view of our holding that the courts have the power to fashion equitable awards based upon the "common benefit" theory, under Title IV, the district court order will be reversed and the case remanded for reconsideration. On this question of whether a common benefit was con-

---

[14] While we do not believe that conferral of a greater benefit upon one particular group prejudices or prohibits an award against a larger benefitted group, the degree of benefit may be relevant to the amount of any award against either. It is conceivable that the benefit to the smaller group would be so greatly disproportionate to the benefit to the larger group that the application of equitable principles would require the assessment of all or the greatest part of the attorneys' fees against the smaller group. However, this record does not seem to present such a situation.

[15] Also we point out that this was not a case involving over a thousand pages of testimony, which could be beneficially summarized in a magistrate's report making reference to the pertinent pages, but one where the record consisted of a single 58-page verified affidavit containing legal argument on many of those 58 pages.

ferred, the district court should carefully consider the unrebutted factual allegations of corruption detailed in the Verified Application, to which we refer above, not only in view of this candidate's successful campaign to vindicate union democracy, and the principles enunciated both in *Local 639* and in this opinion, but particularly in light of the Supreme Court decisions in *Mills* and *Hall v. Cole.*[16]

IV. ON REMAND

It would appear that the discussion of common benefit, to the extent that it existed, in the Memorandum of the district court was dictum, in view of its conclusion that there was no power under Title IV to award attorneys' fees. Having held that the award of equitable relief is not precluded by Title IV of the LMRDA, and that the intervenor may be entitled to attorneys' fees based upon a common benefit conferred upon the USWA, the district court order and opinion will be reversed, and the case remanded for findings and reconsideration of the liability of the defendant for attorneys' fees.

Whether an award is warranted and, if so, the amount of such award, is a matter for initial determination by the district court in the light of the broader application of the "common benefit" rationale required by the above cited opinions.

The standards for determining the amount of the award of attorneys' fees have been developed in previous decisions of this Court.[17] The discretion of the district court, aided by the views of the Secretary, will permit reasoned appraisal of the benefits from the legal services performed by intervenor's counsel. However, although union members should not be required to pay for unnecessary duplication of legal services, it should not be presumed that mere duplication of effort by either counsel for Sadlowski or counsel for the Department of Labor was unnecessary or nonbeneficial.[18]

---

[16] The district court is, of course, free to take further evidence on common benefit and any surrounding circumstances if it concludes that the record is not adequate.

[17] Those decisions include: *Lindy Bros Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al., (Lindy II)*, 540 F.2d 102 (3d Cir. 1976); *Merola v. Atlantic Richfield Co., (Merola II)*, 515 F.2d 165 (3d Cir. 1975); and *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al., (Lindy I)*, 487 F.2d 161 (3d Cir. 1973).

APPENDIX

TITLE IV–ELECTIONS

Terms of Office; Election Procedures
(29 U.S.C. § 481)

Sec. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often then once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by the section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good stading shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or

---

[18] *See* page [18a–19a] above. It is clear that some duplication of effort will always occur, since the Secretary must verify information relating to improper union conduct secured and supplied by an intervenor's counsel. Also, time limitations and exhaustion requirements of 29 U.S.C. § 482 and other provisions, may necessitate legal services on behalf of the Secretary as well as such service on behalf of the intervenor. In this case, the decision of the Secretary to terminate the investigation may have justified the continued efforts of counsel for the intervenor to document and preserve evidence of union misconduct. *See* Verified Application for Attorneys' Fees at 103a–104a.

any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

* * * *

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

* * * * *

Enforcement
(29 U.S.C. § 482)

Sec. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization,

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Application of Other Laws

(29 U.S.C. § 483)

Sec. 403. . . . The remedy provided by this title for challenging an election already conducted shall be exclusive.

ALDISERT, Circuit Judge, dissenting.

This appeal presents the question whether the entire membership of the United Steelworkers of America should pay private attorney's fees [1] for representation of a candidate in an election dispute over the position of District Director for the USWA district in Illinois and Indiana. Appellant Edward Sadlowski lost the election and, after exhausting his union remedies, filed a complaint with the Secretary of Labor seeking to persuade the Secretary to institute court proceedings to upset the election. After investigating Sadlowski's claims, the Secretary brought an action challenging the election. Sadlowski was permitted to intervene, a settlement was reached, and a new election was held in which Sadlowski won the District Director position, which pays an annual salary of $35,000. The majority holds that the international union treasury should pay Sadlowski's counsel fees incurred in connection with the election dispute. I disagree and would affirm the judgment of the district court.

The majority recognizes that *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), which reaffirmed the American Rule respecting the award of attorney's fees, controls this case. But through some very ambitious judicial lawmaking they discover implied authorization in Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481–483, to depart from that rule. Although Title IV does not provide for private attorney's fees and, indeed, may not be enforced by private action, the Supreme Court has allowed private parties to intervene on a limited basis when an action is brought by the Secretary. *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). From this limited, judicial exception to the wholly governmental enforcement scheme of Title IV, the majority concludes that Congress really intended, despite its silence on the point, to allow attorney's fees awards to intervenors in the government proceedings. Having cleared such a high jurisprudential hurdle, the majority has little difficulty negotiating the lesser legal and factual obstacles in its course. It goes further to conclude that Sadlowski's victory in the rerun of the local district election conferred a common benefit on the international union's entire membership throughout the United States and Canada, and that this benefit justifies imposition of attorney's fees under the common benefit exception to the general rule of *Alyeska. See Trustees v. Greenough,* 105 U.S. 527, 26 L.Ed. 1157 (1882). I disagree with both points of the majority's logic.

I.

Title IV of the LMRDA was not enacted in a vacuum; it is one of five titles in a unitary legislative schema. Titles I, II, III, and V rely on private enforcement by individual union members and allow the award of attorney's fees, either expressly or by logical implication from the provision for equitable relief. *See Alyeska, supra; Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Thus, Congress provided that Title I, the bill of rights of union members "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412. In Title II, relating to reporting, Congress also relied on union members for enforcement and specifically provided: "The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 431(c). In Title III, which concerns union trusteeships, Congress again relied on the individual union members, conferring upon them a civil cause of action "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 464(a). And in Title V, which sets forth fiduciary responsibilities of union officers, Congress not only gave union members a right to sue for damages, accounting or other appropriate relief, but it specified that the trial judge "may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization." 29 U.S.C. § 501(b).

---

[1] Based on a lodestar of 1,279 hours at the rate of $100 per hour for senior counsel and $50 per hour for associates, appendix 139–40, *see Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102 (3d Cir. 1976), appellee suggests that appellants may be asking for as much as $500,000. Appellee's Brief at 5.

The enforcement provisions of Title IV contrast sharply with those of the other Titles. Title IV does not contemplate private enforcement. Indeed, the right to file suit to enforce Title IV is limited to the Secretary, 29 U.S.C. § 482(b), and this remedy is declared to be exclusive. 29 U.S.C. § 483. There is no express or implied provision for attorney's fees for private enforcement of Title IV because no private enforcement is contemplated or allowed. *Trbovich v. United Mine Workers of America, supra,* 404 U.S. at 532, 92 S.Ct. at 633, tersely stated the reasons for the special and limited enforcement provisions of Title IV:

> A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court. The alternative proposals were rejected simply because they failed to accomplish these objectives.

As the Supreme Court noted in *Trbovich*, Congress rejected a provision which would have allowed individual union members to bring actions to enforce Title IV. 404 U.S. at 532–36, 92 S.Ct. 630. In Title IV litigation "the Secretary of Labor in effect becomes the union member's lawyer." *Ibid.* at 539, 92 S.Ct. at 636 (quoting Senator Kennedy). I do not read the statute or its legislative history as contrary to the limited right of private intervention which *Trbovich* established. But where Congress definitely rejected private litigation as a means of enforcing Title IV, it is difficult for me to grasp how Congress, at the same time, could have intended that courts award attorney's fees to private counsel in connection with Title IV litigation.

Holmes said that "judges do and must legislate, but they can do so only interstitially; there are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917). In this case, I find the majority's motion to be molar. They leap from careful statutory language that excludes private enforcement, to the circumscribed right of intervention which *Trbovich* allows "so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." 404 U.S. at 537, 92 S.Ct. at 636. Without getting a purchase on the narrow rationale of *Trbovich,* they then vault into the jurisprudential stratosphere to conclude that Congress intended that private attorney's fees would be awarded in connection with litigation that Congress ordered to be carried out exclusively by the Secretary of Labor.

I have set forth my views on the legitimacy and necessity for judicial lawmaking elsewhere.[2] And I am quick to recognize that the precise boundaries of judicial lawmaking are often difficult to ascertain. But "[w]hen a cause of action has been created by statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Fleischmann Corp. v. Maier Brewing,* 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475

---

[2] *See* R. Aldisert, The Judicial Process 1–3 (1976); Aldisert, *An American View of the Judicial Function* in Legal Institutions Today: English and American Approaches Compared 43 (Harry W. Jones, ed., 1977).

(1967). *A fortiori,* an authorization of attorney's fees for activity outside the remedial scheme of the statute should not readily be implied. This is particularly true in view of *Alyeska's* recent, vigorous reaffirmation of the vitality of the American Rule:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. We are asked to fashion a far-reaching exception to this "American rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

421 U.S. at 247, 95 S.Ct. at 1616.

The majority has done what the Supreme Court refused to do in *Alyeska*: they have fashioned a far-reaching exception to the American Rule. Whatever precepts of statutory construction I apply—the Mischief Rule, the Golden Rule, the Literal Rule, the Plain Meaning Rule, or interpretations based on the legislative history—I cannot interpret Title IV as allowing such a result. The majority's reading, in my view, is reminiscent of *dicto simpliciter,* the fallacy of accident. It has not misapplied the general rule to an exceptional case, but has misapplied a limited exception to that which fits the general rule. The exception begins to take on the potency of the general rule. I am as unwilling to engage in such an inversion of the law as I am disinclined to join in the majority's adventure into the legislative cosmos.

II

My resolution of the threshold statutory issue is sufficient to affirm the district court. In addition, however, I do not agree with the majority's second theory—that the consensual agreement to a new election for District Director in Illinois and Indiana conferred a common benefit upon the entire membership of the United Steelworkers of America.

No court made findings as to the conduct of the first election.[3] Indeed, no court ordered a new election in Sadlowski's district. Not only were the allegations regarding the first election unlitigated, but the settlement agreement approved by the district court prior to the second election contained a disclaimer of any concession by the parties as to the truth of the allegations. Nevertheless, the majority makes three interesting statements, each of which takes sustenance from the unlitigated allegations, and upon which the majority postulate their common benefit theory:

> (1) In our view, the entire thrust and effect of Sadlowski's prosecution of these Title IV violations was vindication of democratic process in USWA elections, and his actions redounded to the common benefit of the whole Union.
>
> (2) [W]e note the particularly egregious abuses of the electoral process in this case. Sadlowski was not merely opposed by a member of the USWA "official family," Union officers and agents actively campaigned against him.
>
> (3) Union leadership having exerted such effort to oppose the candidacy of a single insurgent, it would be naive to assume that similar election "irregularities" have not or would not spread to other districts and locals where a member of the "official family" ran opposed. Had such tactics been successful in District 31, there appears to be little doubt that they would have been employed again, and again. The determination and vigor of this union member served to insure to all union members

---

[3] In *Usery v. Local Union No. 639,* 543 F.2d 369) D.C.Cir. 1976), *cert. denied,* ——U.S. ——, 97 S.Ct. 1159, 51 L.Ed.2d 573 (1977), there was an adjudicated violation upon which the rerun election was predicated. *See* 543 F.2d at 384 n. 39. That, in tandem with the fact that the *Usery* action was brought against a local rather than the international union, distinguishes that case from this one. It does not, however, necessarily bring my view into line with the District of Columbia Circuit's. While there might arguably be a sounder basis for equitable relief in the case of an adjudicated violation, Title IV, in my view, still would preclude a fee award.

> the rights which Congress intended to be theirs, and in this instance union democracy would have been a hollow premise without Sadlowski's involvement.

Majority Opinion at [33a–34a].

Although such rhetoric is usually associated with partisan politics, these are not excerpts from political campaign literature. These are statements from an opinion of this court. But they do not derive from the findings of any trial court. They are conclusions drawn by the majority on the basis of certain averments set forth in an application for attorneys' fees. The defendants were not required to challenge or contest the *factual* averments, because they were successful in a *legal* defense that, even if the alleged facts were true, no attorneys' fees were awardable as a matter of law. The federal practice that permits a challenge to the legal sufficiency of a claim tracks the common law demurrer, and admits, for the purpose of argument only, properly averred historical or narrative facts. That such facts are assumed for the purpose of testing a legal issue does not permit a court to draw from them, as did the majority, additional non-factual conclusions, e. g., "vindication of democratic process in USWA elections", "the particularly egregious abuses of the electoral process in this case", and "union democracy would have been a hollow promise without Sadlowski's involvement". As a member of this court, I am constrained to specifically disassociate myself from this extravagant language and from any resulting inferences which tend to impugn the integrity of the International President and members of the Executive Board of the Steelworkers' Union.

The particulars from which the majority's universals are drawn seem centered around two factual complexes: (1) tellers of *Local 1066* had been guilty of vote fraud, see Majority Opinion at [29a–30a]; and (2) Sadlowski's opponent Samuel Evett, was supported by the international union's "official family," *see* Majority Opinion at [3a]. I find the sweeping conclusions drawn from these instances to be striking examples of the fallacy of composition and the fallacy of *post hoc ergo propter hoc.* To conclude that, because *local* tellers ran a fraudulent election the *international* union was responsible, is the fallacious error of reasoning that what is true of part is necessarily true of the whole. To conclude that because international officers supported Sadlowski's opponent in a fraudulent election, the international was therefore responsible for the fraud, is the classic *post hoc* fallacy. The mere chronological sequence of events does not establish a causal connection.

Nevertheless, from this fragile foundation the majority hops to another facet of the same argument, contending that benefiits accuring from a consensual agreement to conduct a second election could be traced with accuracy to a class of beneficiaries constituting the entire membership of the international union. Apparently referencing the prescriptions of *Alyeska,* the majority states that '[t]he overriding considerations in evaluation of 'common benefit' claims are: whether the benefits may be traced with some accuracy; whether the class of beneficiaries is readily identifiable; and whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefiting." Majority Opinion at [32a]. I prefer the *Alyeska* Court's exact formulation: "In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting.' 421 U.S. at 265 n. 39, 95 S.Ct. at 1625. Guided by this precise language, rather than the majority's paraphase, I conclude:

(1) The 1,300,000 members of the United Steelworkers are not "small in number and easily identifiable."

(2) The benefits "can[not] be traced with some accuracy," other than to Sadlowski, who attained the position of District Director as a result of his efforts, and to the 300,000 members of District 31, the only USWA members directly involved in the election.

(3) Detailed studies invoking political science, labor relations, and economics would be necessary to detect the

benefit to the average USWA member as a result of the rerun election in the Illinois-Indiana District. And, in any event, to shift the costs "with some exactitude" would require that Sadlowski and the members of his district pay a significantly greater portion of the fee than the average union member who, if he benefits at all, benefits less than the members of the specific district involved.

In reviewing the accomplishments of appellant's able counsel, I have nothing but the highest praise for the excellence of their services. I quarrel only as to who should pay for those services. I believe that Title IV precludes an award of attorney's fees in this case, and even if it does not, I believe that this is not an appropriate case for an equitable award under the common benefit theory. I would affirm the judgment of the district court.

Appendix B

UNITED STATES COURT OF APPEALS
For the Third Circuit

May 26, 1977

No. 76-1169

Peter J. Brennan, *Secretary of Labor,*
United States Department of Labor
Edward Sadlowski, *Intervenor plaintiff*
Anthony Tomko, *Intervenor plaintiff*
v.
United Steelworkers of America
AFL-CIO-CLC (District 15) (District 31)

Edward Sadlowski, intervenor above named, and the following counsel for Sadlowski:
Joseph L. Rauh, Jr.; Leon Despres; Kenneth J. Yablonski; and Judith Schneider,
Appellants

(D. C. Civil No. 73-957)

Present: Aldisert and Van Dusen, *Circuit Judges* and Brotman, *District Judge.*

1. Motion by appellee for leave to file a petition for rehearing in excess of 15 pages, to and including 21 pages, in the above-entitled case. The opinion was filed and the judgment entered on April 20, 1977. A copy of appellee's petition for rehearing, received today, is enclosed for your information.

Respectfully,

enc. *Clerk*
ags

The foregoing Motion is denied. Appellee is granted ten (10) days within which to file a petition for rehearing in accordance with Rule 40(a), F.R.A.P.[1]

By the Court,
Van Dusen, *Judge*

Dated: June 3, 1977

---

[1] Those joining in the majority opinion note the use of at least four pages (paragraphs 3 on pages ii and 2, the last paragraph on page 2, and parts III and IV on pages 18-21) to characterize the majority opinion, which makes clear at pages 3-4 that the court is

> ". . . not passing on the truth of the statements in the record or on the character of the intervening plaintiffs, as opposed to that of the high-ranking officers of the union, but we are required, under the posture of the case as it existed at the time of the district court order from which the appeal was taken, to take all well-pleaded allegations in the record as true for purposes of this appeal and to construe them in the light most favorable to the plaintiffs (see page 31). These record facts are important in the determination of whether the district court was justified in rejecting the application for attorneys' fees as a matter of law, rather than making its decision as a matter of discretion in the light of the record facts before it."

That opinion remanded the case solely for reconsideration in the light of the controlling authorities on statutory preclusion and "common benefit." At page 7, this language appears:

> ". . . we have concluded that the district court had the right, in its discretion, to award attorneys' fees on the record in this case. We hold that the district court did not have the power to reject the claim for attorneys' fees on the basis of the legal conclusions stated in note 1 above, which we reject."

Defendant-appellee will clearly be entitled to a hearing if the Motion to Dismiss the application for attorneys' fees is denied, and there is nothing in such opinion holding to the contrary. In addition to the hearing on the application which will be available to defendant-appellee if the Motion to Dismiss is denied, the opinion also grants the district court power "to take further evidence on the common benefit and any surrounding circumstances if it concludes that the record is not adequate," since the court may decide, after hearing the views of counsel, to supplement the record without a full hearing on the allegations concerning attorneys' fees.

Appendix C

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 73-957

Peter J. Brennan, ***Secretary of Labor,***
United States Department of Labor,
Plaintiff

v.

United Steelworkers of America
AFL-CIO-CLC (District 31),
Defendant

Edward Sadlowski,
Intervenor

MEMORANDUM

Rosenberg, ***District Judge***

On November 8, 1973, counsel for the plaintiff, Peter J. Brennan, Secretary of Labor, United States Department of Labor, commenced this civil action challenging the February 13, 1973 election for director of District 31 of the defendant, United Steelworkers of America, AFL-CIO-CLC. On January 18, 1973, Edward Sadlowski was permitted to intervene as a party plaintiff for the purpose of safeguarding his own personal interest in the outcome of the District 31 election in which he had been an unsuccessful candidate. *Trbovich* v. *Mineworkers*, 404 U.S. 528 (1972).

Following wide and extensive pretrial proceedings by counsel for the Secretary and counsel for the defendant, a proposed settlement was submitted to the court for approval. With some modification, this agreement was approved on August 23, 1974. It directed that a new election for district director be conducted on November 19, 1974. Following this election the proper certification was filed by the plaintiff in which the intervenor was certified as the duly elected director of District 31, and an order and decree based upon the certification was entered on December 2, 1974.

On January 31, 1975, counsel for the intervenor submitted a "Verified Application for Attorneys' Fees" and submitted a memorandum in support thereof. By order dated March 13, 1975, this application was referred to a United States Magistrate for report and recommendation. After briefing and argument, the magistrate submitted a report and recommendation on July 22, 1975 that the application for fees be denied. Subsequently, counsel for the intervenor filed exceptions to the Magistrate's report and recommendation and the matter was set for hearing.

At the hearing held on November 19, 1975, counsel for the intervenor was granted broad leeway in presenting all possible contentions and objections. Counsel for the defendant likewise made a vigorous argument in support of the Magistrate's determination. Counsel for the plaintiff made a limited presentation which, in essence, emphasized that the Secretary of Labor was the appropriate representative of all interested parties and that counsel for the intervenor merely functioned in a very limited capacity to protect the rights of the intervenor himself.

I have thoroughly reviewed the application for attorneys' fees, the report and recommendation of the magistrate, the exceptions filed thereto, and the arguments presented before me. After a thorough review and analysis of the entire record, hearings and arguments before me, I find no support in fact or in law for the grant of counsel fees in a suit brought under the general provisions of Title IV of the L.M.R.D.A., 29 U.S.C. §§ 481-483.

Congress mandated in 29 U.S.C. § 482(b) that the Secretary of Labor be vested with exclusive authority to review all post-election complaints and take such action as the Secretary deems necessary to vindicate the rights of all union

members. This remedy is the exclusive remedy. ***Dunlop* v. *Bachowski,*** 421 U.S. 560 (1975) and it is only for the limited purpose of safeguarding an individual member's own rights that he may be permitted to intervene. ***Trbovich* v. *Mineworkers, supra.***

In his response to the application for fees, and again at oral argument before me, counsel for the Secretary reminded me of the large number of man-hours which the plaintiff had expended not only here but also in Chicago in order to assure that the rights of the union members were protected. It is to the Secretary's credit that irregularities in the union election were corrected. While it cannot be denied that the intervenor's complaint to the Secretary triggered the events which followed thereafter, any independent investigation which the intervenor might have undertaken was voluntary and self-serving and at the most a mere fraction of and duplicitious of the work entrusted to the Secretary by the Congress. As such, it would be gratuitous.

From a reading of the statute Congress did not intend that individuals become private attorneys general. To permit such procedures would invite every potentially aggrieved union member to retain private counsel and duplicate or imitate the functions of the Secretary with expectations that unlimited fees would become the burden of all the union members. This was not the intent of Congress in vesting this authority in the Secretary.

> ". . . ' . . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceding such litigation as may be warranted. . . .' . . ." ***Dunlop* v. *Bachowski, supra,*** at page 569.

Furthermore, the Supreme Court has definitely mandated that:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 26 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance for attorneys' fees . . ." *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240 (1975), at page 269.

The Court of Appeals for this Circuit has made clear that the limitations imposed by *Alyeska* mandate ". . . that the American rule that each party should bear his own costs controls, except in certain limited situations." *Securities and Exchange Commission* v. *Aberdeen Securities Co., Inc.,* —— F.2d ——, C.A. 3, No. 75-1074 filed November 13, 1975, Slip Opinion, at page 7. The exceptions recognized by the Third Circuit are (1) a contract or statute granting a right to attorneys' fees; (2) the conferring of a common benefit for the recovery of a fund or property; (3) willful disobedience of a court order; or (4) a finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Counsel for the intervenor has failed to demonstrate the existence of any of these or that there is a basis in law or a recognized exception to the general American rule which recognizes an award of attorneys' fees. Accordingly, the exceptions to the Magistrate's Report and Recommendation submitted by counsel for the intervenor will be overruled, and the Report and Recommendation will be adopted as the opinion of this court.

An appropriate order will be entered.

ORDER OF COURT

AND NOW, TO-WIT, this 11th day of December 1975, for the reasons set forth in the foregoing Memorandum, the exceptions to the Magistrate's Report and Recommendation as filed by counsel for the intervenor is hereby overruled; and the Report and Recommendation of the Magistrate is hereby adopted as the opinion of this court.

R. Rosenberg,
United States District Judge

cc:
Counsel of Record

Appendix D

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action No. 73-957

Peter J. Brennan, *Secretary of Labor,*
United States Department of Labor,
Plaintiff

v.

United Steelworkers of America,
AFL-CIO-CLC (District 31),
Defendant

Edward Sadlowski,
Intervenor

MAGISTRATE'S REPORT AND RECOMMENDATION

I. *Recommendation*

It is respectfully recommended that the "Verified Application for Attorneys' Fees" submitted by counsel for the intervenor be denied.

II. *Report*

Presently before the Court for disposition is a "Verified Application for Attorneys' Fees" filed by counsel for the intervenor.

On February 23, 1973, Edward Sadlowski wrote a letter to the Secretary of Labor ("the Secretary") protesting the February 13, 1973 election for Director of District 31, United Steelworkers of America. Specifically, Sadlowski alleged that the Steelworkers failed to provide adequate safeguards to assure a fair election in District 31.

Following investigation, on November 8, 1973, the Secretary commenced this civil action challenging the election and seeking, *inter alia,* to have the February 13, 1973 election declared null and void, and an order directing that a new election be conducted. On December 21, 1973, Sadlowski was permitted to intervene as a party plaintiff. *Trbovich* v. *Mine Workers,* 404 U.S. 528 (1972).[1]

Extensive pretrial discovery was conducted, and on August 2, 1974, a proposed settlement agreement was submitted to the court for approval. That agreement provided that a new election for the office of Director of District 31 be held on or before November 29, 1974, said election to be conducted under the supervision of the Secretary, in accordance with Title IV of the LMRDA (29 U.S.C. § 481, *et seq.*).

The settlement agreement was approved by the court on August 23, 1974, with the added provision that the election be conducted on or before November 19, 1974.[2] The court retained jurisdiction over the action until the results of the election were certified by the Secretary and an appropriate final decree entered.

On November 29, 1974, a certificate of election was filed by the Secretary, certifying that the intervenor had been elected Director of District 31. In an Order and Decree dated December 2, 1974, it was adjudicated that Edward Sadlowski was the duly elected Director of District 31.

On January 31, 1975, Joseph L. Rauh, Jr., Leon Despres,

---

[1] In *Trbovich,* the Court approved the intervention by an individual in an already pending suit. The Court held that this procedure does not denigrate from the original Congressional intent of making suits by the Secretary the exclusive post-election remedy. "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." 404 U.S. at 532. Specifically, the Court found that "intervention by union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the union to relatively little additional burden." 404 U.S. at 536.

[2] Counsel for the intervenor claim that this change in election date resulted from the intervenor's efforts to have the election conducted prior to the Thanksgiving vacation, thereby insuring a more equitable result.

Kenneth J. Yablonski and Judith Schneider, counsel for intervenor-Sadlowski, filed the instant application for counsel fees.

In support of this application an extensive memorandum has been submitted which states that:

> ". . . throughout the period of information-gathering, the Union administrative proceedings required to invoke the Labor Department jurisdiction; throughout the proceedings in that Department and before the Court, leading to the Order of a new election; and throughout the period of efforts to assure that the new election would be free of the fraud and corruption of the earlier vote, intervenor's counsel played a crucial role in assuring and vindicating union democracy. A testimonial to the quality and effectiveness of counsel's efforts is the outcome of the re-run election compared with the outcome of the original vote."

For these efforts counsel for the intervenor seek fees which have been estimated by the defendant to be as high as one-half million dollars.

Where a court in the exercise of its discretionary function, or in enforcing specific statutory authorization or contractual agreements, awards attorneys' fees, certain guidelines have been established. In *Lindy Bros. Bldrs. Inc. of Phila.* v. *American R. & S. San. Corp.,* 487 F.2d 161 (3d Cir. 1973), the Court set forth guidelines to be employed to assure compensation to counsel for the reasonable value of his services. The first determination to be made is to accurately ascertain the amount of time devoted to the case. Secondly, the court must attempt to place a value on those services to the class as a whole and then attempt to determine the value of those services which inured to the unrepresented class' benefit. Thirdly, an effort must be made to ascertain the reasonable or normal value of the attorneys' services in view of his professional reputation and status. This figure is then adjusted

to reflect the contingent nature of success, and the quality of the work performed in view of the complexity and novelty of the issues. The amount thus arrived at must then be apportioned amongst the beneficiaries of the action. These standards were reaffirmed in *Estein* v. *Christian,* 507 F.2d 61, 63 (3d Cir. 1975). In order to arrive at such fees, the court in *Lindy,* 487 F.2d at 169, emphasized the necessity for an evidentiary hearing to provide the factual basis for assessing the various criteria set forth above.

In the present case, the parties have agreed that extensive discovery would be required before an evidentiary hearing could be conducted to determine the amount of an award, if any. For this reason, counsel have consented to stay all discovery pending a resolution of the legal basis upon which fees may be granted or denied. Accordingly, the matter presently before the Court is restricted to a determination of whether or not there exists a basis in law or in equity for the award of counsel fees. If this issue is resolved in favor of the petitioners, extensive discovery must follow. However, if this issue is determined adverse to the petitioners, then no further action is necessary.

By order dated March 13, 1975, this matter was referred to the undersigned United States Magistrate for report and recommendation. Extensive briefing was conducted by all parties, and argument held on the limited issue of whether or not attorneys' fees are recoverable under Title IV of the LMRDA.

In *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 43 L.W. 4561 (No. 73-1977 filed May 12, 1975), the Court reviewed the 'American Rule' that the prevailing party may not recover attorneys' fees as costs or otherwise.[3] See also: *United States Steel Corporation* v. *United States,* F.2d (3d

---

[3] The Court of Appeals for the District of Columbia (495 F.2d 1026) had awarded fees to the respondent against the petitioner, holding that the respondent acting as a private attorney-general, had acted to vindicate the rights of all citizens. The Supreme Court reversed.

Cir. No. 74-2183, filed June 16, 1975). After reviewing considerable historical background, the Court in *Alyeska* reiterated the proposition that absent specific authorization, either statutory or contractual, litigants must assume their own counsel fees.[4] However, the Court also recognized:

> ". . . the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." 43 L.W. at 4567.[5]

Certain other exceptions to the "American Rule" have gained acceptance. Counsel fees may be awarded where the efforts of a litigant confers a "substantial benefit" on an ascertainable class. *Hall* v. *Cole,* 412 U.S. 1 (1973), *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). Another recognized exception is that "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for offensive reasons." *F. D. Rich Co., Inc.* v. *Industrial Lumber Co., Inc.,* 417 U.S. 116, 129 (1974). Also recognized as an exception to the general rule is the situation where a party has acted as a "private attorney general" in vindicating a strong public interest and conferring widespread public benefit. *Bradley* v. *School Board,* 416 U.S. 696 (1974).

While cognizant of these exceptions, the Court in *Alyeska* emphasized that upon the general exclusionary "American Rule" Congress has elected to create certain statutory exceptions thereby creating explicit provisions for the allowance of counsel fees.[6] In other cases, the Court stated:

> ". . . Congressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.
>
> "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." 43 L.W. at 4568-69.

Accordingly, the Court concluded:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases, but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." 43 L.W. at 4570.

Thus, the Court concluded that it was inappropriate to judicially reallocate the burden of litigation, without specific Congressional guidelines. Furthermore, in *United States Steel Corporation* v. *United States, supra,* the Court of Appeals for this Circuit observed that *Alyeska* has provided ". . . a trenchant statement that the Supreme Court is not inclined at the present time to enlarge the traditional scope of attorney fee awards." (Slip Opinion, p. 8).

---

[4] See: *Hall* v. *Cole,* 412 U.S. 1 (1973).

[5] See: *Hall* v. *Cole, supra.*

[6] For a detailed listing of some of these statutory exceptions see *Alyeska Pipeline Service* v. *Wilderness Society, supra,* footnote 33, 43 L. W. at 4568.

We now turn specifically to the issue of the propriety of awarding counsel fees pursuant to the various sections of LMRDA.

Title I of the Act, 29 U.S.C. §§ 411-415 creates a bill of rights for union members. In enforcing these rights, an individual is permitted to bring a civil action in a United States District Court "for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412. This has been held to include awarding attorneys' fees. *Hall* v. *Cole, supra.*

Title II of the Act contains the reporting provisions, 29 U.S.C. § 431-440, and contains specific authorization for the allowance of attorneys' fees. 29 U.S.C. § 431(c).

Title III of the Act, 29 U.S.C. § 461-466 concerns trusteeships, and provides in 29 U.S.C. § 464(a) for suit brought in a United States district court, by a union member for "such relief (including injunctions) as may be appropriate."

Title V of the Act, U.S.C. §§ 501-504 concerns the fiduciary responsibility of union officers, and provides that a union member may bring suit in a United States District Court for appropriate relief including attorneys' fees. 29 U.S.C. § 501(b).

Thus, in those instances where fees are allowed, Congress has recognized the rights of an individual member to bring suit to vindicate the general rights of all other members.

However, the present action arises under Title IV of the Act, 29 U.S.C. § 481-483, which concerns union elections. Specific means are provided in 29 U.S.C. § 482 to challenge the validity of a union election. It is provided that after exhausting internal remedies, a union member may file a complaint with the Secretary. 29 U.S.C. § 482(a). It is then directed in Section 401(b) of the Act, 29 U.S.C. Section 482(b) that:

> "The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

In interpreting this function, the Court stated in *Dunlop* v. *Bachowski,* 43 L.W. 4669, 4671-4672, (No. 74-466 filed June 2, 1975) that:

> "Congress 'decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest . . . [and] decided not to permit individuals to block or delay union elections by filing federal-court suits. . . .' *Calhoon* v. *Harvey,* 379 U.S. 134, 140 (1964). Congress' concern was to settle as quickly as practicable the cloud on the incumbent's title to office,' *Wirtz* v. *Glass Bottle Blowers,* [389 U.S. 463 (1968)] 389 U.S. at 468 n. 7, and in 'deliberately [giving] exclusive enforcement authority to the Secretary . . . emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. . . .' *id.,* 473-475. . . . it is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint. . . . The expertise and resources of the Labor Department were surely meant to have a broader play. . . .' *Wirtz* v. *Laborers' Union,* 389 U.S. 477, 482-483 (1968). . . . Congress

made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted. . . .’ *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 532 (1972). ‘. . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary.” *Id.,* at 536. ‘ . . . The statute gives the individual union members certain rights against their union and ‘the Secretary of Labor in effect becomes the union member’s lawyer’ for purposes of enforcing those rights. . . .’ *Id.,* 538-539.”

Thus, in *Bachowski,* the Court held that while the Secretary had the exclusive right to determine whether or not to bring suit to challenge an election, as counsel for the union members, the Secretary must provide a complaining member with reasons supporting a determination not to bring suit. 43 L.W. at 4673. Once these reasons are stated, the scope of judicial review of the Secretary’s decision is very narrowly circumscribed. 43 L.W. at 4671. The Court in *Bachowski* concluded that this review:

> “. . . should be confined to examination of the reasons statement and the determination whether the statement without more evinces that the Secretary’s decision is so irrational as to constitute the decision arbitrary and capricious.” 43 L.W. at 4673.

Thus, it was determined that the clear intent of Congress was to cloak the Secretary with the mantle of counsel for all union members in an attempt to challenge an election pursuant to Title IV, LMRDA. However, it was also recognized that at times the interests of an individual member do not always completely coincide with the interests of the union as a whole. Within this narrow confine an individ-

ual member is permitted to pursue his own interest. *Trbovich* v. *Mine Workers, supra.*

Counsel for the intervenor here, seek an award under the “common benefit” doctrine, *i.e.,* the spreading of the cost to those persons deriving benefits from their action. *Mills* v. *Electric Auto-Lite, supra,* 396 U.S. at 393-394.[7]

While the Court in *Alyeska* approved the common benefit concept, it cautioned that the costs be spread amongst the beneficiaries of the litigation. 43 L.W. at 4563. In *Hall* v. *Cole, supra,* the Court concluded that an award against the union treasury was appropriate since *all* members had benefited from the litigation. 412 U.S. at 8-9. However, in *Hall* v. *Cole,* the Court noted parenthetically that a valid consideration in awarding fees is:

---

[7] In *Hall* v. *Cole, supra,* f.n. 7, the Court stated:

“This exception has its origins in the ‘common-fund’ cases, which have traditionally awarded attorneys’ fees to the successful plaintiff when his representative action creates or traces a ‘common-fund,’ the economic benefit of which is shared by all members of the class. See *eg., Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885); *Trustees* v. *Greenough,* 105 U.S. 527 (1882). In *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), the rationale of these cases was extended to authorize an award of attorneys’ fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis.* In reaching this result, the Court explained that the beneficiaries of the plaintiff’s litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant’s assets from which the beneficiaries eventually would recover. Finally, in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation ‘ “which corrects or prevents an abuse which would be prejudicial to the rights and interest” ’ of those others. *Id.,* at 396, quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.,* 257 Minn. 362, 366-367, 101N. W. 2d 423, 427 (1960).

“Citing our decisions in *Mills, supra,* and *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), respondent contends that the award of attorneys’ fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a ‘ “private attorney general,” vindicating, a policy that Congress considered of the highest priority.’ *Id.,* at 402. See also *Knight* v. *Auciello,* 453 F.2d 852 (CA 1 1972); *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143 (CA 5 1971). In light of our conclusion with respect to the ‘common benefit’ rationale, however, we have no occasion to consider that question.”

> ". . . the extent to which the payment of the plaintiff's counsel fees out of the union treasury might impair the union's ability to operate effectively . . . . Here, the petitioners do not, and indeed cannot, contend that the award of only $5,500 would in any sense jeopardize union stability." 412 U.S. at 15, f.n. 23.

In applying the common-fund theory, the Court in *Alyeska,* 43 L.W. at 4569 f.n. 39 observed:

> "In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs."

District 31 covers a geographic area including part of Northeastern Illinois and Northwestern Indiana. Its membership consists of approximately 126,000 persons. The defendant, United Steelworkers of America, has approximately 1,400,000 members. Because the individual districts are not labor organizations within the meaning of 29 U.S.C. § 402 (i), suit was brought against the national union as an entity. (See stipulation filed January 21, 1974, and to which counsel for the intervenor expressed no objection despite an opportunity to do so).

In enacting LMRDA, "it is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interests . . ." *Calhoon* v. *Harvey,* 379 U.S. 134, 140 (1964).

In his response to the application for attorneys' fees, the Secretary states:

> "Without attempting to detract from the efforts of counsel for intervenor, it must be pointed out that it is quite customary for the Department's investigators to receive assistance from the complainant in the conduct of their investigation of an election, even when the complainant is not represented by an attorney. Indeed it is self-evident that the major part of the leads pursued by the investigators in such an investigation derive from the complainant's allegations. However, the Department pursues its own investigation to obtain evidence which may or may not substantiate those allegations. In this case, the Department spent approximately 3,600 man hours in the investigation of Sadlowski's complaint.
>
> "After the filing of the suit, the government's attorneys promptly instituted discovery and moved for expedition of the proceedings. The government was prepared to proceed to trial without the additional evidence sought by counsel for intervenor through his depositions. The Stipulation of Settlement was negotiated by the government and approved in accordance with the agreement of the principal parties.
>
> "The supervision of the election was the responsibility of the Department of Labor. The Department utilized the expertise gained through the supervision of hundreds of elections during the fifteen years of the Act's existence. The Department expended approximately 25,000 man hours in connection with its supervisory role.
>
> "In short, the Department of Labor has conscientiously

fulfilled its responsibilities with respect to the investigation of Sadlowski's complaint, the successful prosecution of the litigation, and the supervision of the ensuing election in such a manner as to insure the free operation of the democratic process."

In performing such a function the Secretary was following the mandate of Congress in Title IV that he serve as counsel for the union membership as an entity. The only exception to such a role in a Title IV suit is the allowance of intervention by a person who believes that the Secretary's actions will not adequately protect his own limited interests. *Trbovich* v. *Mine Workers, supra.* Intervention, in such circumstances is authorized because such action foists relatively little additional burden on the union. *Trbovich* v. *Mine Workers, supra.*

Accordingly, the extensive program undertaken by the intervenor to invalidate the earlier election, and secure his own election was purely a matter of very limited interest. Although counsel for the intervenor argues that their action vindicates the interests of all union members in securing free elections, it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole.

Furthermore, even if this latter proposition were true, Congress has ascribed the task of insuring the propriety of union elections to the Secretary. The individual may only seek to vindicate his own limited personal interest.

The acts of counsel for the intervenor in many respects duplicated the efforts of the Secretary.

In *Alyeska,* 43 L.W. at 4569, f.n. 39, the Court repeated that its common-benefit awards involved a small readily identifiable class of beneficiaries whose benefits could be accurately traced. In addition, the shifting of costs could be

done with exactitude, and without sophisticated economic analysis. Accordingly, an assessment of fees against the defendant union does not assess a small, readily identifiable class of beneficiaries. Rather, it taxes all union members, whose benefits, if any, are extremely vague and indirect.

In addition, allowing fees directly contravenes the goal of Congress in appointing the Secretary as counsel for all members, and utilizing his resources and expertise for the benefit of all concerned.

Furthermore, any award of fees would impose an enormous burden on the defendant. This clearly would not be in accord with the Court's observation in *Hall* v. *Cole,* 412 U.S. at 15 that the fees awarded would only be minimal in nature. Nor would such an award fall within the category of "relatively little additional burden" justifying intervention. *Trbovich* v. *Mine Workers,* 404 U.S. at 536.

The observation of the Court in *Alyeska,* 43 L.W. at 4570-71, warrants repeating again:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees . . .
>
> ". . . the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs . . ." 43 L.W. at 4570-71.

Accordingly, it is respectfully recommended that the "Verified Application for Attorneys' Fees" submitted by counsel for the intervenor be denied.

Respectfully submitted,

/s/ ROBERT C. MITCHELL
United States Magistrate

Appendix E

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 76-1169

Peter J. Brennan, *Secretary of Labor,*
United States Department of Labor
Edward Sadlowski, *Intervenor plaintiff*
Anthony Tomko, *Intervenor plaintiff*

v.

United Steelworkers of America
AFL-CIO-CLC (District 15) (District 31)

Edward Sadlowski, intervenor above named, and the following counsel for Sadlowski:
Joseph L. Rauh, Jr.; Leon Despres; Kenneth J. Yablonski; and Judith Schneider,
Appellants

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge,* and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges.*

The petition for rehearing filed by appellee, United Steelworkers of America, AFL-CIO-CLC (District 15) (District 31), in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Arlin M. Adams,
Judge

Dated: July 5, 1977

Appendix F

SUPREME COURT OF THE UNITED STATES

No. A-283

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI AND RAY MARSHALL,
Secretary of Labor

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same hereby is, extended to and including November 2, 1977.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the
Supreme Court of the
United States

Dated this 23d day of September, 1977

Supreme Court, U. S.
FILED
JAN 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-643

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI

AND

RAY MARSHALL, *Secretary of Labor.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF REPORTING IMPORTANT DEVELOPMENT

BERNARD KLEIMAN
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Gottesman, Cohen
& Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JAMES D. ENGLISH
CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI
AND
RAY MARSHALL, *Secretary of Labor*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL BRIEF REPORTING IMPORTANT DEVELOPMENT

Petitioner submits this supplemental brief pursuant to Rule 24(5) to report an important development of which this Court should be aware in ruling upon the petition for certiorari: announcement of the Solicitor of Labor's views with respect to the statutory preclusion issue presented in this case. Heretofore, the Solicitor had not announced a view on the issue (see Petition, page 8), and the court below (as well as the D.C. Circuit in the *Local 693* case) relied upon this abstention as evidence that awards of attorneys fees are not inconsistent with the statutory purpose:

> "As the Secretary's determination to take no position on this issue [of the propriety of an award of attorney's fees] suggests, allowance of attorney's fees for union member efforts in aid of the Secretary's action does not undercut the exclusivity of the administrative remedy . . .
>
> * * *
>
> "Nothing has been suggested to us which indicates that the Secretary's role could be or has been threatened by Sadlowski's attorneys . . ." (App. 20a, 21a).

The Solicitor of Labor has now reconsidered, and has concluded that "the Department was mistaken in its decision to take no official position in these cases. "In a letter to petitioner's counsel herein, the Solicitor states that "the allowance of such fees will, in fact, interfere with the Department's effective enforcement of Title IV." The original of this letter has been lodged with the Clerk, and it is reprinted in an appendix to this brief.

Three reasons are cited by the Solicitor for her conclusion that the availability of fee awards would interfere with the effective enforcement of Title IV:

(1) Fee claims will require extensive litigation relating to the merits of elections, even where the Secretary's action has been settled, and "could well have the effect of discouraging settlements in other Title IV cases."

(2) Fee claims of necessity must challenge the adequacy of the Secretary's performance (else intervenors could not claim to have conferred any benefit) and this "creates the unfortunate situation of making the Secretary a co-defendant with the union on the attorney's fee question."

(3) The availability of fees will encourage "frivolous intervention in Title IV suits in the hope of recovering substantial attorney's fees from the union should the suit be successful" and will "protract the litigation of Title IV suits as intervenors attempt to inject new matters in order to lay the predicate for a fee claim."

The Solicitor of Labor states further that if certiorari is granted in this case she will urge the submission of a brief by the Solicitor General "opposing the availability of attorney's fees to Title IV intervenors."

This expression of the Solicitor's views confirms the arguments advanced in our petition with respect to the statutory preclusion issue, and makes even clearer that certiorari ought to be granted.

Respectfully submitted,

Bernard Kleiman
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

Michael H. Gottesman
Robert M. Weinberg
Bredhoff, Gottesman, Cohen
& Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

James D. English
Carl B. Frankel
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioner

Appendix

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington, D.C. 20210

January 5, 1978

Michael H. Gottesman, Esquire
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: *United Steelworkers of America*
v. *Edward Sadlowski*

Dear Mr. Gottesman:

Pursuant to your request, I have carefully reviewed the above-captioned case in light of the petition for certiorari which was filed in November. I have also reviewed the earlier *Local 639, Teamsters* case. Based on this review, I am convinced that the Department was mistaken in its decision to take no official position in these cases with respect to the allowance of attorneys' fees to intervenors in suits brought by the Secretary of Labor under Title IV of the Landrum-Griffin Act. It is my view that the allowance of such fees will, in fact, interfere with the Department's effective enforcement of Title IV and it is unfortunate that the courts have concluded from the Department's silence on the issue that it will not. I am also disturbed by the implication in the Court of Appeals' opinion that the intervenor may seek to litigate issues arising in connection with the contested election in support of his attorney's fee application, even though consideration of the merits is otherwise foreclosed by the parties' stipulation of settlement. To permit litigation concerning the merits of the underlying dispute in such circumstances could well have the effect of discouraging settlements in other Title IV cases.

I am also troubled by the intervenor's attack on the Secretary of Labor. It is apparent that an intervenor, in order to establish that he conferred a "benefit" which would not have resulted had the Secretary prosecuted the suit alone, must inevitably attack the performance of the Secretary as an integral part of his claim for attorneys' fees. This creates the unfortunate situation of making the Secretary a co-defendant with the union on the attorney's fee question.

I am further concerned that the decisions of the Third and D.C. Circuits may encourage frivolous intervention in Title IV suits in the hope of recovering substantial attorney's fees from the union should the suit be successful, and will protract the litigation of Title IV suits as intervenors attempt to inject new matters in order to lay the predicate for a fee claim.

It is unfortunate that the Department did not participate in this case at the appellate level. However, if the Supreme Court grants certiorari, I will urge the Department to request the permission of the Solicitor General to submit a brief on the merits opposing the availability of attorney's fees to Title IV intervenors.

Sincerely,

/s/ CARIN ANN CLAUSS

Solicitor of Labor

Supreme Court, U. S.
FILED

DEC 1 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI AND
RAY MARSHALL, *Secretary of Labor, Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF FOR RESPONDENT EDWARD SADLOWSKI IN OPPOSITION

JOHN W. DOUGLAS
C. MICHAEL BUXTON
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent Edward Sadlowski

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

COUNTER-STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. The Decision of the Court of Appeals Is In Accord With the Decisions of This Court 4

A. There Has Been No Statutory Preclusion of Attorneys' Fees 4

B. A Common Benefit Award Is Permissible 9

II. The Questions Presented Have Been Resolved in a Similar Manner by All Federal Courts of Appeals Which Have Addressed Them 13

III. Any Consideration of This Case by the Court Is Premature 14

CONCLUSION 14

TABLE OF AUTHORITIES

CASES:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 10

Bakery & Confectionery Workers Internatl. Union v. Ratner, 118 U.S. App. D.C. 269, 335 F.2d 691 (1964) 13-14

Calhoon v. Harvey, 379 U.S. 134 (1964) 7

Dunlop v. Bachowski, 421 U.S. 560 (1975) 5

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 4, 6

Hall v. Cole, 412 U.S. 1 (1973) 4, 5, 6, 8, 10, 11, 13

Hodgson v. Local 6799, United Steelworkers of America, 403 U.S. 333 (1971) 5

Hodgson v. Machinists Lodge 851, 454 F.2d 545 (7th Cir. 1971) 7

McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976) ...11, 14

Page

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 4, 5, 10
Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 3, 4, 5, 8
Usery v. Local Union No. 639, Internatl. Broth. of Teamsters, Etc., 177 U.S. App. D.C. 222, 543 F.2d 369 (1976), *cert. denied sub nom.* Local Union No. 639 v. Marshall, 429 U.S. 1123 (1977) ..4, 6, 7, 10, 11, 13
Wirtz v. Local 125, Laborers' Internatl. Union, 389 U.S. 477 (1968) 4-5
Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463 (1968) 4, 12
Yablonski v. United Mine Workers, 151 U.S. App. D.C. 253, 466 F.2d 424 (1972), *cert. denied,* 412 U.S. 918 (1973) 6, 14

STATUTES:

Federal Rules of Civil Procedure
  Rule 24 9
  Rule 24(a) 5

Labor Management Reporting and Disclosure Act
  Section 402, 29 U.S.C. § 482 7
  Title I 6, 13
  Title III 11, 14
  Title IV ....Passim
  Title V 14

Lanham Act, 15 U.S.C. §§ 1051-1127 6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI AND
RAY MARSHALL, *Secretary of Labor, Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT EDWARD SADLOWSKI IN OPPOSITION

Respondent Edward Sadlowski submits this Brief in opposition to the petition of the United Steelworkers of America for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued on April 20, 1977.

QUESTION PRESENTED

Whether this Court should grant *certiorari* to review the decision of the Court of Appeals that Title

IV of the LMRDA does not preclude an award of attorneys' fees to a union member who successfully intervenes in the Secretary of Labor's action against the union, and through his efforts to correct union election irregularities contributes a common benefit to the members of the union, where

(1) the decision is in accord with the decisions of this Court,

(2) the decision is consistent with the decisions of other courts of appeals which have considered the question, and

(3) the decision remands the case to the District Court for determination of the amount of the attorneys' fees.

COUNTER-STATEMENT OF THE CASE

Respondent relies upon the full statement of facts contained in the opinion of the Court of Appeals (Petn. App. A, at 2a-5a, 13a-21a). The basic facts are as follows:

Respondent lost an election for the directorship of District 31 of the petitioner the United Steelworkers. District 31 is the largest district in the union. Contending that widespread irregularities had occurred in that election, respondent, pursuant to Title IV of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 482, brought a complaint before the petitioner union. When the union refused to act on respondent's complaint, respondent complained to the Secretary of Labor.

Some time thereafter and pursuant to the statute, the Secretary of Labor brought an action in the U.S.

District Court for the Western District of Pennsylvania against the petitioner union to overturn the election on the grounds of certain irregularities in the conduct of the election. Respondent intervened in that action, as permitted by *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), and participated in discovery and development of the case. Thereafter, an agreement was reached whereby petitioner agreed to hold a new election to be supervised by the Secretary and the District Court. Respondent and his attorneys assisted in the formulation of procedures to govern the new election and assisted in monitoring it. Respondent won the new election with a margin of almost two-to-one. The District Court then ruled, as a matter of law, that respondent was not entitled to attorneys' fees. The Court of Appeals for the Third Circuit reversed that ruling and ordered the District Court to determine the appropriate fees.[1]

REASONS FOR DENYING THE WRIT

This case presents no issues worthy of consideration by this Court upon *certiorari*. The decision of the Court of Appeals is merely a straightforward application of previous decisions of this Court, with limited practical significance beyond the discrete facts of this Title IV case. Moreover, the decision is squarely in point with a decision of the D.C. Circuit, in which this

---

[1] The appropriate fees have yet to be determined. Petitioner's estimate (Petn. 6) that the fees might approach $500,000 is without foundation. Respondent's Verified Application for Attorney's Fees, filed in the District Court, listed 1785 total hours of work by his attorneys. Much of that work was performed by a young attorney recently out of law school. Thus, clearly the fee would not approach the amount suggested by petitioner.

Court recently denied *certiorari*. *Usery* v. *Local Union No. 639, Internatl. Broth. of Teamsters, Etc.,* 177 U.S. App. D.C. 222, 543 F.2d 369 (1976), *cert. denied sub nom. Local Union No. 639* v. *Marshall,* 429 U.S. 1123 (1977). No federal appellate court decision conflicts with the instant one. Finally, no attorneys' fees have yet been awarded. The Third Circuit has simply ruled that fees are permissible here, and left the question of the proper amount to the District Court. Review by this Court in such circumstances would be wholly premature and unwarranted.

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT

A. There Has Been No Statutory Preclusion of Attorneys' Fees

Petitioner argues that Title IV of the LMRDA should be read to preclude an award of attorneys' fees to successful intervenors such as respondent. Petitioner also argues that the Court of Appeals' ruling to the contrary is inconsistent with the decisions of this Court in four cases—*Trbovich, Hall, Mills,* and *Fleischmann.*[2]

The post-election remedial scheme of Title IV, described in detail in the opinion below (App. A, at 10a-21a), is dependent on the diligent efforts of a union member such as respondent.[3] The union member must ferret out the election irregularity, bring it to the attention of the union, and if relief is not forthcoming, formally complain to the Secretary of Labor. The Secretary's ability to institute a federal court action under Title IV is absolutely dependent on such action by the union member.

In *Trbovich,* this Court held that union members may intervene, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, in Title IV post-election suits brought by the Secretary. *Trbovich* specifically rejected the argument (renewed by petitioner here) that the Secretary's "exclusive" power to institute an election challenge under Title IV forbade intervention and participation by interested union members. The Court held that Congress did not intend to preclude private participation in the Title IV enforcement litigation, where union members "assist" the Secretary in the prosecution of such action.[4] The *Trbovich* ruling was extended in *Dunlop* v. *Bachowski,* 421 U.S. 560 (1975), where this Court held that a federal court even has jurisdiction to entertain an action by a union member challenging the refusal and failure of the Secretary of Labor to institute, after investigation, a Title IV action challenging a union election.

This Court's decisions in *Hall* and in *Mills* held that the absence of specific statutory authorization for attorneys' fees did not preclude such an award. Indeed, *Hall* specifically addressed the propriety of an award of fees under the LMRDA, in a suit by a union member under Title I, challenging efforts by his union to curb his exercise of free speech rights. The Court believed that to deny an award of fees "would be tantamount to repealing [the LMRDA] by frustrating its basic purpose." *Hall* v. *Cole,* 412 U.S. 1, 13 (1973).

---

[2] Trbovich v. United Mine Workers, 404 U.S. 528 (1972); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[3] This Court has frequently emphasized the important role of the union member in the Title IV post-election enforcement mechanism. *E.g.,* Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463 (1968); Wirtz v. Local 125, Laborers' Internatl. Union, 389 U.S. 477 (1968); Hodgson v. Local 6799, United Steelworkers of America, 403 U.S. 333 (1971).

[4] ***Trbovich*** **specifically recognized that the union member intervenor could play a valuable role in "assisting the court in fashioning a suitable remedial order." 404 U.S. at 537 n.8.**

> " 'It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden . . . [w]ithout counsel fees. . . .' " *Ibid.*

Despite this Court's broad recognition of the important role of union members in enforcing the LMRDA, petitioner argues that the decision below is inconsistent with *Fleischmann.* There, the Court was concerned with a claim to attorneys' fees under the Lanham Act (15 U.S.C. §§ 1051-1127), in a suit by one corporation against another for trademark infringement. The Court held (1) that the meticulously detailed remedies of the Lanham Act evidenced a specific congressional intent to preclude an award of fees, *and* (2) that no basis existed for an award of fees under the equitable powers of federal courts.

In *Hall,* however, this Court rejected *Fleischmann's* applicability to Title I of the LMRDA. Moreover, two federal courts of appeals have now rejected *Fleischmann's* applicability to preclude fees in cases under Title IV.[5] The D.C. Circuit in the *Local 639* case,

---

[5] *See also* Yablonski v. United Mine Workers, 151 U.S. App. D.C. 253, 258, 466 F.2d 424, 429 (1972), *cert. denied,* 412 U.S. 918 (1973).

supra, 177 U.S. App. D.C. at 239-41, 543 F.2d at 386-88, and the Third Circuit in the instant case (App. A, at 6a-10a) both recognized that Title IV requires that federal courts fill out the details of the statutory scheme. For example, despite the absence of a provision for settlements in the statute, many cases, such as the instant one, have been settled short of actual trial, and this Court has stressed the ameliorative function of the Secretary in encouraging settlements.[6] Other courts have read a "waiver" procedure into the statute with respect to the 60-day limitations period of Section 402 to afford time to negotiate settlements,[7] and thereafter approved the resulting disposition as in conformity with Title IV. In addition, at the remedial stage, courts have defined the timing, scope, and procedures of the new supervised election, and have entered orders embodying a broad range of ancillary relief to insure the integrity of the contest. *See Usery* v. *Local 639, supra,* 177 U.S. App. D.C. at 241, 543 F.2d at 388.

It is, therefore, evident that the Third Circuit here has simply applied the decisions of this Court, and followed other appellate courts which have examined this attorneys' fees question. The decision below represents no more than an application of the principles of those cases and raises no issue worthy of review here. Moreover, the case is of limited practical significance because it applies only in the limited circumstances of a Title IV action where a union member intervenes.

Petitioner strives to extend the practical significance of the case, offering a parade of hypothetical horribles

---

[6] *See* Calhoon v. Harvey, 379 U.S. 134, 140-41 (1964).

[7] *See* Hodgson v. Machinists Lodge 851, 454 F.2d 545 (7th Cir. 1971).

(Petn. 24-28) against permitting an award of fees in Title IV post-election cases. Basically, petitioner argues that potential fee awards will "burden" the union with undue litigation. The point is without merit.

Petitioner argues that *Trbovich* prevents Title IV intervenors from participating in any manner that would burden the union. But *Trbovich* recognized that Title IV sought only to prevent the union from being forced to litigate alleged election irregularities in multiple suits and forums. *Trbovich* v. *United Mine Workers, supra,* 404 U.S. at 532. *Trbovich* saw no burden in permitting a union member to participate, as intervenor, in the litigation brought by the Secretary. Indeed, this Court recognized in *Hall* that the possibility that fees will somehow burden the union is "relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Hall* v. *Cole, supra,* 412 U.S. at 9 n.13 (emphasis original).

Petitioner's strained claim of extended litigation needed to determine the fee award in this case is most appropriately addressed to the District Court upon remand, and certainly does not make this case worthy of review here. In any event, litigation over the appropriate fee in the District Court will only be complicated if petitioner so chooses. As noted by the Third Circuit (App. A, at 37a-40a), the District Court simply needs to determine the time spent by respondent's counsel, their contribution to the litigation and to the union membership and the appropriate hourly fee. This should be a routine matter. As also noted by the Third Circuit (App. A, at 35a-36a), petitioner had an

obligation and an opportunity to correct any election irregularities during the internal union administrative procedures prior to the bringing of the Secretary's action. Hence, whatever "burden" has resulted is appropriately borne by the union; unions are subject to an award of fees under every other title of the LMRDA. Indeed, under most titles, they can be sued by individual union members in multiple suits and forums. The burdens of defending potential fee claims are surely greater in those cases than under Title IV, since any claims by an intervenor such as respondent must be made within the context of the suit brought by the Secretary of Labor.[8]

B. A Common Benefit Award Is Permissible

The Court of Appeals held that on the undisputed facts of this case, respondent had demonstrated a basis for an award of fees under the common benefit doctrine.[9] That decision clearly is consistent with this

---

[8] In addition, any potential intervenor in a Title IV action must satisfy the standards of FRCP 24 before intervention will be permitted; this again underscores the limited practical effect of the Third Circuit's decision.

[9] Respondent filed in the District Court a verified application for attorneys' fees which set forth his and his counsel's efforts before the union and as intervenor in the Secretary's suit. Since petitioner opposed the application by a motion to dismiss, the District Court was required to treat any factual allegations in this statement as true. The District Court held as a matter of law that respondent bestowed no common benefit on the membership of the union.

Petitioner's arguments, based on the statement of the dissenting judge below that no "irregularities" were committed by national union officials, have nothing to do with the attorneys' fees questions which petitioner asks this Court to review. As even petitioner admits (Petn. 12 n.1), the Court of Appeals regarded the allegations of respondent's fee application as true for purposes of re-

Court's earlier decisions in *Hall,* in *Mills,* and in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), where this Court expressly reaffirmed the availability of an award of fees under the common benefit doctrine. Nothing in the opinion below suggests, as petitioner urges, that it was applying the "private attorney general" theory of fee awards rejected in *Alyeska.* The decision below correctly identified the group that would benefit from Sadlowski's efforts—the membership of the petitioner union:

> " 'Fee shifting' is particularly appropriate because of the close match between the party assessed and the beneficiary of the litigation. Indeed, the benefited class, its contours shaped by the union's self-description and its finances based on per capita payments, fits the paradigm for 'common benefit' cases." (App. A, at 32a, quoting *Usery* v. *Local 639, supra,* 177 U.S. App. D.C. at 236, 543 F.2d at 383.)

The discrete nature of the challenges made by petitioner to the common benefit ruling illustrates the inappropriateness of review. Petitioner argues that only union members within the district where the disputed election occurred were benefited. Alternatively, petitioner argues that a "greater" benefit went to those district members, thereby somehow preventing an award based on a lesser benefit to the rest of the union members.

---

solving the *legal* issue before it. Irregularities or improper actions by top union officials need not to be found to support a common benefit award. Respondent must demonstrate that through his litigation efforts he has conferred a common benefit on the union membership by vindicating union democracy. Moreover, as held by this Court in *Mills,* the fact that the litigation below was settled does not prevent the award of a fee based on the common benefit doctrine. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

The short answer to these arguments, as given by the Third Circuit, is that a benefit was conferred on all union members in light of the facts of this case.[10] Directors of the various districts of petitioner union sit on the national governing board of the union where they represent the interests of every union member. In addition, the candidate against whom respondent ran in District 31 was actively supported by the top officials in the union. Respondent was directly responsible for instituting and completing the process necessary for the Secretary of Labor's action, and, as intervenor, assisted in the development of procedures for the rerun election. The Court of Appeals' decision is thus perfectly consistent with this Court's decision in *Hall,* where the union member's efforts to overcome union-imposed restrictions on his right to speak out were held to benefit the entire union. In sum, the right of each union member to free and fair elections—guaranteed by Title IV of the LMRDA—was protected and strengthened by respondent's efforts.[11]

---

[10] Petitioner seems to suggest that McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976), is inconsistent with the decision here. In *McDonald,* involving a suit to dissolve a union trusteeship under Title III of the LMRDA, the court approved an award based on a common benefit to members of a local union. *No benefit to the members of the national union was alleged;* thus, the court's comments about the appropriateness of an award based on a benefit to the national membership are distinguishable from the instant case.

[11] Both the Third Circuit here and the D.C. Circuit in *Local 639* held that the fact that only the Secretary of Labor is authorized to institute the Title IV action in federal court does not preclude an award of fees to an intervenor. As noted by the Fifth Circuit in reaching a similar result under Title III of the LMRDA, a common benefit award is appropriate "even though an individual may invoke the government's legal resources to prosecute a cause." McDonald v. Oliver, 525 F.2d 1217, 1228 (5th Cir. 1976) (footnote omitted).

The fact that a greater benefit may have been received by members of the union district (District 31) where the election occurred calls for no different result.[12] The only basis for finding a greater benefit to District 31 members is because they voted in the election at issue; but the director they elect represents the entire union membership and votes on matters affecting all of that membership. Nor does it matter that District 31 and other Steelworkers districts have no treasury from which the award can come. After all, it is the petitioner union itself which has decided how to collect and account for its dues. As recognized by the Third Circuit:

> "To hold that attorneys' fees must be recovered from a fund created by those who received the greatest benefit, rather than from a fund created by those who received a legally sufficient and significant benefit, would be tantamount to denial of that recovery. But more than that, such a holding would effectively allow unions to insulate themselves from union member attempts to prosecute Title IV violations. By creating an internal structure that comingles funds and denies their identifiability to an individual unit, unions could preclude recovery of attorneys' fees. Such action would thwart the process of complaint and productive intervention by union members, and deny effect to the policies enunciated by the LMRDA and *Trbovich.*" (App. A, at 36a.)

---

[12] The fact that respondent may also have received a personal benefit from his efforts—*i.e.*, his election to the district directorship in the rerun election—does not, as petitioner suggests, preclude a common benefit recovery. The LMRDA is not designed merely to protect the interests of the candidate but of the entire membership in free and democratic union elections. Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463, 475 (1968).

Petitioner's purported analogy (Petn. 37) to state elections misses the point. A union is a membership of workers controlled by one "government"—the national union—and subdivisions within them are merely set up by the national union for the administrative convenience of the national union. Such is obviously not the relationship of the several states to the Federal Government, and one doubts that the leadership of the United Steelworkers views its locals and districts as state governments in a federal system.

II. THE QUESTIONS PRESENTED HAVE BEEN RESOLVED IN A SIMILAR MANNER BY ALL FEDERAL COURTS OF APPEALS WHICH HAVE ADDRESSED THEM

As mentioned above, the decision of the D.C. Circuit in *Usery* v. *Local Union No. 639, Internatl. Broth. of Teamsters, Etc., supra,* is squarely in point with this case. Petitioner does not dispute this (Petn. 13). In *Local 639,* a district court had similarly denied fees, finding that Title IV precluded an award, and that no common benefit could be bestowed on the union by a union member responsible for bringing a complaint to the Secretary of Labor and later intervening in the Secretary's suit. The D.C. Circuit reversed that holding, and held as a matter of law, as has the Third Circuit here, that there was no statutory preclusion and that a common benefit could be demonstrated by an intervenor in the Secretary's Title IV suit.

Moreover, as recognized by the D.C. Circuit in *Local 639,* 177 U.S. App. D.C. at 235-36, 543 F.2d at 382-83, various federal courts have uniformly applied a common benefit rationale to award fees in other cases arising under the LMRDA. *See, e.g., Hall* v. *Cole,* 412 U.S. 1 (1973) (Title I); *Bakery & Confectionery*

Workers Internatl. Union v. *Ratner,* 118 U.S. App. D.C. 269, 335 F.2d 691 (1964) (Title V); *Yablonski* v. *United Mine Workers,* 151 U.S. App. D.C. 253, 466 F.2d 424 (1972), *cert. denied,* 412 U.S. 918 (1973) (Title IV pre-election suits); *McDonald* v. *Oliver,* 525 F.2d 1217 (5th Cir. 1976) (Title III).

III. ANY CONSIDERATION OF THIS CASE BY THE COURT IS PREMATURE

The District Court in this case refused to award fees in the erroneous belief that it did not have the power to do so under Title IV. The Court of Appeals has decided that fees can be awarded, and has ordered the District Court to determine the appropriate fee in light of its opinion. No fees have yet been awarded. Consideration of this case prior to the final award of fees by the District Court would be premature.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

John W. Douglas
C. Michael Buxton
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6386

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Supreme Court, U. S.
FILED
FEB 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

EDWARD SADLOWSKI

and

RAY MARSHALL, Secretary of Labor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENT SADLOWSKI

JOHN W. DOUGLAS
C. MICHAEL BUXTON

888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI
and
RAY MARSHALL, Secretary of Labor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT SADLOWSKI

This brief is filed by Respondent Sadlowski in response to the Petitioner Steelworkers' "Supplemental Brief Reporting Important Development" filed with this Court on January 17, 1978. The development was said by Petitioner to be a letter to Petitioners' counsel, dated January 5, 1978, from the Labor Department's Solicitor.

In the light of the statement in that letter that the Solicitor had reviewed the earlier *Local 639, Teamsters* case, we are somewhat surprised that no reference was made therein to the recent position taken by the Labor Department in the U.S. District Court for the District of Columbia in that case. On July 18, 1977, after the decision by the U.S. Court of Appeals and the denial of certiorari, the Government filed, at the request of the District Court, a "Statement of Services of Plaintiffs'-Intervenors' Attorney Prior to the Filing of this Suit". The present Labor Department Solicitor was listed of counsel on the last page of that filing. A copy of this Government filing on behalf of the Labor Department is attached hereto as an Appendix; a certified copy thereof has been filed with the Clerk of the Court.

In that recent filing, the Government stated that counsel for the intervenors there had rendered valuable assistance to the Labor Department in its successful prosecution of its Title IV action, both before and after the filing of the complaint. The representations made by the Government in its *Local 639, Teamsters* filing are important because, in our view, they reflect the actual experience of the Labor Department in the Title IV intervenors-fee area. The Government's affirmation there of the usefulness to the Secretary of the intervenor-attorney's services (before and after the filing of the complaint) is inconsistent with the arguments contained in the Solicitor's letter and hence provide added reason for the denial of certiorari here.

Respectfully submitted,

John W. Douglas
C. Michael Buxton

888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

CIVIL ACTION
No. 1963-72

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, *Plaintiff,*
and
DANIEL GEORGE,
and
PHILLIP FEASTER, *Intervenors-Plaintiffs,*

v.

LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND., *Defendant.*

Statement on Services of Plaintiffs'-Intervenors' Attorney Prior to the Filing of This Suit

The court has requested a statement of the Secretary of Labor concerning the value of the services of Intervenors' attorney prior to the filing of this case.

The disputed election for Local 639 officers was scheduled to be held in December 1971, with nominations in November. At the nominations meeting of November 7, 1971, numerous members of the George-Feaster slate were disqualified for failure to attend four meetings in each of the two years immediately prior to nomination.

Article XXII, Section 5 of the Teamsters' Constitution required an appeal in writing within 48 hours. Mr. George and his slate filed a detailed protest on November 9, 1971, stating their objections to the meeting attendance rule; that it was contrary to the International Constitution as it required more than 50 percent attendance for two one year periods; that some members did not receive credit for meetings they attended and that very few members could run under the rule.

On November 18, 1971, Fitzsimmons directed that a new nominations meeting be held without applying the rule, saying it was contrary to the Constitution.

The new meeting was held on December 19, 1971, and again a number of members were disqualified, this time for not having attended 50 percent of the meetings in the previous two years. On December 20, 1971, seven disqualified members of the George-Feaster slate sent separate letters of protest to Fitzsimmons which Mr. Long assisted in preparing.

The grounds for protest in these appeals were that the attendance records were inadequate, that they were discriminatorily applied, that no excuse was provided for absence due to work or illness, as required by the Constitution, and that the rules for the second nomination meeting were unclear.

In addition, George learned that Local 639 was attempting to declare him ineligible as he was not working at the trade by reason of his discharge from Jacobs Transfer. In September 1971, Daniel George had been fired from his job with Jacobs Transfer Company as a result of his production of a leaflet charging that Local 639 had a "sweetheart contract" with Jacobs Transfer. With Mr. Long's assistance, he wrote to President Fitzsimmons on December 22, 1971, explaining all the circumstances of his discharge and that he was pursuing his remedies at the NLRB. Fitzsimmons restored George to the ballot, along with four members of the slate but did not restore three members on whose behalf appeals were immediately filed to preserve their rights under the Constitution.

The election was held on January 23, 1972 and the incumbent slate was elected. Complainants-Intervenors now undertook to exhaust (or to invoke for three months if no final answer was given) their internal union remedies. These remedies must be invoked under Section 402(a) of the LMRDA and each step must be taken in a timely fashion in order for the Secretary to obtain jurisdiction. In addition, under the rule set forth in *Hodgson* v. *Local 6799, Steelworkers,* 403 U.S. 333, the Secretary may not sue on any point which was not complained of in the internal exhaustion unless that point was unknown to the complainants and could not reasonably have been known to them.

It should be noted that the pre-election protests concerning eligibility of candidates are also required in order to preserve those points for the appeal to the Secretary, and that the deadlines for action were in each case only 48 hours. On January 24, 1972, George and Feaster filed a protest with Local 639 and Joint Council 55 raising 12 points. These points included all the violations which the Secretary ultimately found to have occurred. Joint Council No. 55 conducted a hearing on February 18, 1972 and on February 23, 1972. Mr. Long, although not allowed to be present before the Joint Council, assisted in preparing the presentation which partially convinced the Joint Council. On April 5, 1972, Joint Council No. 55 ruled that a new election was required because of improper notice but not by reason of any of the other protests made. George on behalf of himself and Feaster protested the decision to the International on April 6, 1972, urging that all their objections should be sustained. Local President DeBrouse also protested this order. On April 17, International President Fitzsimmons wrote stating a hearing would be scheduled, and by telegram of April 19, 1972, appointed Vice President Gibbons to chair an appeal panel set for April 29, 1972. On April 22, 1972, George wrote Fitzsimmons requesting assistance in obtaining certain information to prepare for the hearing. By telegram received April 24, 1972, Fitzsimmons postponed the hearing; on April 28, 1972, John Long wrote Fitzsimmons seeking information on the hearing and on May 4, 1972, Fitzsimmons responded to George's question and also rescheduled the hearing for June 3, 1972. Long protested this date on May 8, 1972, and Fitzsimmons defended it by letter of May 9, 1972. On May 10, 1972, George requested an earlier date and on May 12, 1972, Fitzsimmons refused. On May 17, 1972, having invoked their internal remedies for more than three months without receiving a final decision. George and Feaster filed a timely complaint with the Secretary.

The exhaustion procedure in this case was properly carried out, and the internal complaint brought to the attention of the union all the matters which the Secretary eventually found to constitute violations as well as several others.

Once the complaint was filed with the Secretary, Mr. Long was active and helpful in the investigation. He suggested witnesses and helped arrange contacts with friendly witnesses.

In summary, those services which Mr. Long provided prior to the filing of the action contributed to providing the Secretary with a solid jurisdictional basis for bring suit, preserved all grounds for suit, helped provide evidence of violations, and, insofar as that suit resulted in benefits to the membership of Local 639, were of value to the union.

While this court is, as the Court of Appeals stated, readily able to take into account those services which Mr. Long rendered after the filing of the action, there were several matters in which Mr. Long assisted the Secretary which may not be within the purview of the court, (a) Mr. Long arranged to assist the Marshall's office in making service of the complaint on Local 639 and defendant was successfully served, and (b) during the campaign and the election under the Secretary's supervision, Mr. Long drew to the Secretary's attention a number of instances of incipient violations of the Act. As a result, the Secretary was able to contact officials of Local 639 in time to prevent most of these violations. In the case of the union's failure to post notice of George's eligibility, Mr. Long's prompt action helped assure that the violation was remedied before the election.

/s/ ____________________
BARBARA ALLEN BABCOCK
Assistant Attorney General

____
United States Attorney

/s/ ____________________
DAVID J. ANDERSON
Attorney, Department of Justice

Attorneys for Plaintiff

U.S. Department of Justice
Civil Division
Washington, D.C. 20530
Telephone: RE 7-8200

CARIN A. CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

MARSHALL HARRIS
Regional Solicitor

HAROLD MOUZON
Attorney

U.S. Department of Labor
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 1977, I served the attached Statement on Services of Plaintiffs'-Intervenors' Attorney Prior to the Filing of This Suit by mailing one copy, postage prepaid, to:

Solaman G. Lippman, Esquire
1801 K Street, N.W.
Washington, D.C. 20006

John V. Long
5272 River Road, Suite 690
Washington, D.C. 20016

Lester M. Bridgeman
1750 N.Y. Avenue, N.W.
Washington, D.C. 20006

Charles Both, Esquire
Yablonski, Both, Edelman
1150 Connecticut Avenue, N.W.
Washington, D.C.

/s/ ____________________
HAROLD MOUZON

Supreme Court, U.S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI
and
RAY MARSHALL, Secretary of Labor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT SADLOWSKI

JOHN W. DOUGLAS
C. MICHAEL BUXTON

888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
EDWARD SADLOWSKI
and
RAY MARSHALL, Secretary of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT SADLOWSKI

This brief is filed by Respondent Sadlowski in response to the Memorandum on Behalf of the Secretary of Labor, recently filed by the Solicitor General.

The Solicitor General urges this Court to grant the Petition for Certiorari filed by the petitioner United

Steelworkers of America and to reverse the decision below. The Solicitor General contends that the decision of the Third Circuit authorizing an award of attorneys' fees to an intervenor in Title IV proceedings is in error because (1) it "significantly impedes the effective enforcement of Title IV"; and (2) is inconsistent with the law. These arguments are without merit.

I. The Availability Of Attorneys' Fees To A Successful Intervenor Does Not Impede The Secretary Of Labor's Enforcement Of Title IV.

The Solicitor General argues that the availability of fees impedes Title IV enforcement because it encourages intervention in suits brought by the Secretary of Labor and discourages the union from settling such suits.

A. The argument that intervention will be encouraged is nothing more than a make-weight. The decision to intervene, as it true of most litigation decisions, is unlikely to be made on the basis of the availability of attorneys' fees. Intervention is sought in order to protect one's own interests, to assist the Secretary, and to protect the democratic processes of union elections. Most importantly, the decision below does not *guarantee* attorneys' fees to intervenors; it permits an award only if the intervenor can demonstrate that there is some equitable basis on which to base an award. Faced with such a burden, it is unlikely that the union member will seek to intervene merely because of the potential availability of fees.

The argument (Memorandum 4-5) that attorneys' fees will encourage intervention "at a stage when no further contribution to the lawsuit is useful" is belied

by the actual experience of the Department of Labor in Title IV litigation. In *Usery* v. *Local Union No. 639, Internat'l Broth. of Teamsters, Etc.,* 177 U.S. App. D.C. 222, 543 F.2d 369 (1976), *cert. denied sub nom. Local Union 639* v. *Marshall,* 429 U.S. 1123 (1977), upon remand by the D. C. Circuit for determination of the amount of attorneys' fees, the Government (the Departments of Labor and Justice) advised the District Court that the intervenors there had rendered valuable assistance to the Labor Department in its successful prosecution of its Title IV action, both before and after the filing of the complaint.[1] No mention of any deleterious effect on the Department of Labor's enforcement authority was alluded to there, and the District Court (Hart. J.) specifically referred to the Government's views in awarding the fees in question.[2]

The Department of Labor's experience under a similar title of the LMRDA—Title III, 29 U.S.C. § 464(a), involving union trusteeships—also undercuts its claims here. Under Title III, both the Secretary of Labor and an individual union member may sue to challenge a union trusteeship. A union member may also intervene in the Secretary's Title III action. Attorneys' fees have been awarded to individual union members who brought suit under Title III, even where their action was essentially in support of a similar suit brought by the Secretary. *McDonald* v. *Oliver,* 525 F.2d 1217 (5th Cir. 1976). So far as we are aware, the Department of

---

[1] The memorandum filed by the Government in the *Local 639, Teamsters* case is included as an Appendix to the "Supplemental Brief of Respondent Sadlowski," filed in this case on February 1, 1978.

[2] The District Court's order in the *Local 639, Teamsters* case is attached to this Brief as an Appendix.

Labor has not suggested that an award of fees in such Title III actions hampers its independent enforcement authority.

B. The Solicitor General argues (Memorandum 5-6) that if the union is subject to attorneys' fees litigation with intervenors, it will have a "substantial disincentive" (*Id.* at 5) to settle the case and, thereby, agree to a new election. The union will feel, in the Solicitor General's view, that since it must presumably litigate with an intervenor over fees, there is no reason to settle the election dispute with the Department of Labor.

The flaw in this argument is apparent. It assumes that the union will prefer to needlessly litigate the election claims (with the concomitant expenditure of funds for its own lawyers) solely because it faces possible future litigation with the intervenor over the latter's attorneys' fees. It is not surprising that the Solicitor General offers no empirical or historical evidence for this unsupported assertion. Indeed, one can argue just as plausibly, and perhaps more plausibly, that the availability of fees is just as likely to prompt the union to settle promptly rather than increase possible monetary exposure by litigating the election claims. Presumably, settlement, especially early settlement, will lessen the extent of the intervenor's contribution to the litigation and hence will reduce his allowable attorneys' fees.

II. An Award Of Attorneys' Fees Is Not Inconsistent With The LMRDA.

The Solicitor General recognizes that regardless of the strength of the argument that attorneys' fees would hamper enforcement, the decision below may only be reversed if it is inconsistent with prevailing law. Therefore, he argues that Title IV precludes an award of

fees. Both the court below and the D. C. Circuit in the *Local 639, Teamsters* case have rejected this contention. There is no legislative history (and the Solicitor General points to none) which supports this position. The decision of this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972) specifically rejected the argument (Memorandum 4) that the Secretary of Labor's "exclusive" power to institute an election challenge under Title IV forbade intervention and participation by interested union members. Contrary to the "public-private" dichotomy suggested by the Government (Memorandum 7), *Trbovich* recognized that intervenors under Title IV could provide assistance to the Secretary in protecting union democracy. 404 U.S. at 538-39. The Solicitor General now asks this Court to rule that the mere future possibility of attorneys' fees to an intervenor so hinders the Secretary that a congressional intent to preclude such an award must be found. Yet a ruling to that effect would effectively nullify the *Trbovich* right of intervention.

In sum, despite its disclaimer, the Government is now asking this Court to take away from the rank-and-file union members the effective exercise of the very right which the Court conferred on those same members in *Trbovich* over the same type of objections raised by the Government. Indeed, the failure to make fees available (upon a proper common benefit showing) might itself undermine enforcement of Title IV, since the Secretary's authority to sue under Title IV is dependent on the diligent legal efforts of the rank-and-file union member.[3]

---

[3] *See, e.g.,* Supplemental Brief of Respondent Sadlowski, Appendix, p. 4a (filed February 1, 1978).

III. Review Of This Case Now Would Be Premature And Inappropriate.

The Solicitor General acknowledges (Memorandum 1-2) that the Secretary of Labor has declined heretofore to take a position in the district courts and courts of appeals on the issue of attorneys' fees in Title IV cases. Certainly, that is true in the instant case. Thus, no lower court has had the benefit of considering the view of the United States on this question—a view which was apparently announced only a few weeks ago.[4]

The Solicitor General is unable to specify why, in such circumstances, this case is the appropriate vehicle to decide this issue. The lower courts should be given the opportunity to examine these arguments of the Government in the first instance. This is especially true here, where there is no current conflict among the courts of appeals which have decided the issue. Both the D. C. Circuit in *Local 639, Teamsters, supra,* in which *certiorari* was denied, and the Third Circuit below have held that an award of fees to Title IV intervenors is permissible where a common benefit is shown.

The Government does not suggest that it will not have ample opportunity to present its views to the lower courts in these or other Title IV proceedings. Moreover, here, at the very least, it is clear that the potential availability of attorneys' fees did *not* prevent the Government from settling this Title IV suit with the petitioner union. Until a conflict arises or the lower courts have been presented with the Government's arguments, the issue does not merit the attention of this busy Court.

---

[4] Letter of Solicitor of Labor, dated January 5, 1978, included in Petitioner's Supplemental Brief, p. 1a.

Respectfully submitted,

John W. Douglas
C. Michael Buxton
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6386

Attorneys for Respondent
Edward Sadlowski

Of Counsel:

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D. C. 20006

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, *Plaintiff*

and

DANIEL GEORGE and PHILLIP A. FEASTER,
Intervenor-Plaintiffs,

v.

LOCAL UNION No. 639, etc., *Defendant*

Civil Action No. 1963-72

Order

(filed August 4, 1977)

Upon consideration of Intervenor-Plaintiffs Amended and Supplemental Motion for an order awarding them legal fees, costs and suit money in the amount of $55,000 for 590.12 hours in services performed both before and after the disputed Union election of January 1972; Defendant Union's opposition in so far as Intervenor-Plaintiffs seek payment for hours logged prior to the January 1972 election and for efforts asserted by the Union to be duplicative of those expended by the Secretary of Labor, and seek payment in an amount in excess of $27,500; the Secretary of Labor's memorandum, submitted pursuant to the Court's request, suggesting that counsel for Intervenor-Plaintiffs had significantly assisted the Secretary in vindicating statutory rights; and the opposition of Frank C. DeBrouse and Robert A. Moore, who, as members of the Union sought, and were granted, leave to intervene as defendants; and the Court having heard oral argument on open Court on July 29, 1977, and .

The Court finding that counsel for Intervenor-Plaintiffs had devoted more than 500 hours of their time on post-election matters in this action and various appeals therefrom, virtually all of which, other than that time devoted to seeking attorneys fees, was of considerable assistance to the Secretary and the Courts involved; the Court further finding that the time spent by Intervenor-Plaintiffs' counsel in seeking vindication of their claim to an attorneys fee is compensible by the Union; the Court having considered the qualifications of counsel, the nature and quality of work performed by them and other pertinent factors, consideration of which is prescribed by decisions of the Court of Appeals for this Circuit;[1] the Court having considered the normal charges in the legal community for similar work; the fact that principal counsel for Intervenor-Plaintiffs in this case was outstanding in his representation of Intervenor-Plaintiffs; that counsel vindicated important rights of Union members, *i.e.*, the right to free and fair union elections and administration, and that they succeeded in establishing significant new principles of labor law; and

The Court having concluded that the contribution of counsel for Intervenor-Plaintiffs was of substantial benefit to others in addition to Plaintiff-Intervenors, and that compensation at the rate of $50 per hour plus a nominal "multiplier" as recommended by the Union would be inadequate in light of all the circumstances, it is, by the Court this 3rd day of August 1977

ORDERED, that Intervenor-Plaintiffs be, and they hereby are, awarded legal fees, costs and suit money in the amount

---

[1] *National Treasury Employees Union* v. *Nixon*, 172 U.S.App.D.C. 217, 222-23, 521 F.2d 317, 322-23 (1975); *Pete* v. *UMWAWRF*, 171 U.S.App.D.C. 1, 16, 517 F.2d 1275, 1290 (1975).

of Thirty-Five Thousand Dollars ($35,000.00) as a fair and reasonable amount for post-election services rendered; said amount to be paid over to counsel of record for Intervenor-Plaintiffs by Defendant Local Uinon 639 on or before October 15, 1977 or at such other time or times as may be agreed upon.

/s/ GEORGE L. HART, Jr.,

George L. Hart, Jr.,
United States District Judge

Supreme Court, U. S.
FILED
MAR 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-643

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER
v.
EDWARD SADLOWSKI AND
RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM ON BEHALF OF THE SECRETARY OF LABOR

WADE H. McCREE, Jr.,
Solicitor General,
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CARIN ANN CLAUSS,
Solicitor of Labor,
BEATE BLOCH,
Associate Solicitor,
SYLVIA T. HOROWITZ,
Attorney,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-643

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

EDWARD SADLOWSKI AND
RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM ON BEHALF OF THE SECRETARY OF LABOR

INTRODUCTION

This memorandum is submitted on behalf of the Secretary of Labor in response to this Court's Order of January 23, 1978.

Although he is a party to the litigation, the Secretary has not heretofore participated in this proceeding for the recovery of attorneys' fees by the Intervenor-Plaintiff, Edward Sadlowski. In a "Statement of Position" filed at the request of the Magistrate in this case, the Secretary indicated his view that the Labor-Management Reporting and Disclosure Act of

256-471 -78

1959 (LMRDA) does not appear to authorize an award of attorneys' fees to an intervenor in Title IV litigation in which the Secretary has been successful. However, he declined to participate in a proceeding in which he felt he had "no involvement or direct interest."[1] For the same reason, the Secretary declined to express a view on the propriety of an attorney's fee award in *Usery* v. *Local 639, International Brotherhood of Teamsters,* 543 F. 2d 369 (C.A. D.C.), certiorari denied *sub nom. Local Union No. 639* v. *Marshall,* 429 U.S. 1123, in which the Court of Appeals for the District of Columbia Circuit also upheld an award of attorneys' fees to the intervenor. In both cases, the respective courts of appeals attached significance to the Secretary's silence (see 543 F. 2d at 385; Petition, p. 20a).

On reconsideration, however, we have reached the conclusion—as the Solicitor of Labor has candidly expressed it (Letter of January 5, 1978, in petitioner's Supplemental Brief Reporting Important Development, p. 1a)—that "the Department was mistaken in its decision to take no official position in these cases with respect to the allowance of attorneys' fees to intervenors.' We now believe a rule permitting the recovery of such attorneys' fees significantly impedes the effective enforcement of Title IV. And, although we are sensitive to the charge that our earlier indications of disinterest may have misled the court of appeals, we are nevertheless persuaded that the question is of sufficient importance to merit review by this Court in the present case, and accordingly urge the Court to grant the pending petition for certiorari.

---

[1] For the convenience of the Court, a copy of the Statement is attached to this brief as Appendix A.

BEST COPY AVAILABLE

DISCUSSION

1. We are not concerned, at this stage of the case in this Court, with the issue of the exact formula that might be appropriate for determining the amount of attorneys' fees recoverable by an intervenor if any such award is permissible. Rather, we address the broad question whether, in any suit under Title IV of the LMRDA, the court does or does not have authority to assess the union for attorneys' fees claimed by the intervenor. Our submission is that, in no case, is the court authorized to make such an award. We add, however, that, in practice, if such awards are permissible, it is predictable that attorneys' fees, in substantial sums,[2] will almost invariably be assessed against the union when the proceeding is successfully concluded. For, whatever the precise test, it will be a rare instance when a successful intervenor's claim to have contributed to the litigation will be entirely defeated.

If we are right in this assessment of the realities, the question presented assumes greater importance and the present case is as appropriate a vehicle for deciding it as any that will arise in the future. The rule announced here, if correct, will govern every subsequent instance of successful intervention in a Title IV suit.

---

[2] In the present case, the fee bill submitted by three senior attorneys and one associate, on the basis of hours logged at stated rates and without applying any "multiplier," would exceed $114,000.

2. It may be objected that, even so, the issue is of little significance because, since the green light was given in *Trbovich* v. *Mine Workers,* 404 U.S. 528, six years ago now, such interventions have been very infrequent. But that may not remain the situation. Indeed, part of our concern is that the expectation of recovering attorneys' fees will substantially increase the number of such interventions.

So saying, we do not mean to question *Trbovich.* Nor would we urge effectively "repealing" that decision by denying an award of counsel fees to intervenors. Cf. *Hall* v. *Cole,* 412 U.S. 1, 13. But, in the context of Title IV of the LMRDA, where—unlike Title I—the complainant does not initiate the court action and is merely "seconding" the Secretary, the occasion for separate legal representation is very much diminished. Moreover, the successful intervenor in a Title IV suit—unlike the plaintiff under Title I—has at least a serious prospect of achieving union office and with it a position in which he will be better able to compensate his attorney.

On the other hand, there is ground for apprehending that the potential recovery of attorneys' fees directly from the union will unduly encourage intervention. Indeed, the holding here and in the *Local 639* case, *supra,* will prompt intervention at a stage when no further contribution to the lawsuit is useful. The reason is that attorneys' fees incurred before intervention are allowed but can only be recovered by formally intervening.

3. Nor is an artificial stimulus to intervention our sole concern. Perhaps more important is the adverse effect on settlements that, in our view, is likely to result if attorneys' fees must be awarded to the intervenor. It is self-evident that unions will be less inclined to agree to end the litigation by voluntary compliance if they are exposed to a substantial monetary award in the form of counsel fees for the intervenor. In suits under Title IV—unlike other parts of the LMRDA—damages are not recoverable, thus encouraging settlement. But the balance is disturbed when the union must, besides agreeing to a supervised election, also accept liability for payment of the intervenor's attorneys' fees.

Moreover, settlements are often effected—as in the present case—on terms that include a disclaimer of any wrongdoing by the union itself. Yet such a disclaimer may not survive the complainant's attempt to justify his claim for attorneys' fees. The knowledge that accusations of misdeeds will follow may well discourage settlements.

Any substantial disincentive to settlement of Title IV litigation is serious. Settlements have particular value in this area because of the practical importance of a speedy disposition. Obviously, if a new election is to be held, that should happen as soon as possible. At present, well over half of the Title IV suits initiated by the Secretary are successfully concluded by settlement.[3] The effective implementation of the law would be severely affected if that were no longer to be the case.

4. What is more, whether or not the suit is resolved by settlement, a rule allowing the award of attorneys' fees will often burden the litigation with further proceedings. Presumably, the intervenor must show that his formal participation in the lawsuit was necessary in advancing something more than his own private interest, and, if so, to what extent his attorneys' fees are attributable to a contribution for the "common benefit" of all union members. This may involve an effective new trial of the merits. And it may place the parties in unnatural postures: the intervenor justifying his participation by attacking the Secretary's shortcomings as a litigant, and the union defending the Secretary to show that attorneys' fees were needlessly incurred. At all events, delays and further costs will often result.

5. For the reasons just outlined, we believe that the allowance of attorneys' fees to successful intervenors will seriously burden Title IV litigation and will prejudice the administration of the Act. Of course, those consequences, however inconvenient, must be borne if the law requires it. But we submit it does not.

Indeed, the rationale of the ***Trbovich*** decision was, in important part at least, that the intervenor has a *private* interest in the outcome of the suit which, although related, is not identical, with the Secretary's broader concern—assuring union democracy. 404 U.S. at 538–539. Here, unlike the situation in *Hall* v. *Cole, supra,* the Secretary alone is charged by Congress with vindicating the public interest. It would seem to follow that the intervenor's participation is not for the "common benefit" of all union members, but, rather, to safeguard his personal stake in the result. If that is so, then, attorneys' fees ought not be awarded under the prevailing guidelines. See *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240.

In our submission, this is not an appropriate instance for departing from the "American rule." The right of intervention recognized by ***Trbovich*** was not intended to lead to "burdensome multiple litigation" (404 U.S. at 536) or to imperil the salutary experience of early settlements in Title IV cases. Nor does the limited relief provided in suits under this Title (see 29 U.S.C. 482(c)) suggest a congressional intention to expose unions to substantial monetary penalties in the form of claims for attorneys' fees. We believe the decision below is unsupported in law.

---

[3] We are informed by the Department of Labor that, of the 103 Title IV cases initiated since January 1973 and finally disposed of at the district court level, some 64 were concluded by settlement. Almost invariably, those settlements involve supervision by the Secretary of the forthcoming election, normally a new special election, otherwise, if time does not permit, the next regularly scheduled union election.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted and the judgment of the court of appeals reversed.

Wade H. McCree, Jr.,
Solicitor General.
Louis F. Claiborne,
Assistant to the Solicitor General.

Carin Ann Clauss,
Solicitor of Labor,
Beate Bloch,
Associate Solicitor,
Sylvia T. Horowitz,
Attorney,
Department of Labor.
March 1978.

APPENDIX A

United States District Court for the Western District of Pennsylvania

[Civil Action, File No. 73-0957 B]

John T. Dunlop, Secretary of Labor, United States Department of Labor, plaintiff

v.

United Steelworkers of America, AFL-CIO-CLC (District 31), defendant, Edward Sadlowski, intervenor

PLAINTIFF'S STATEMENT OF POSITION RE INTERVENOR'S VERIFIED APPLICATION FOR ATTORNEY'S FEES DIRECTED AGAINST DEFENDANT

The Intervenor presently seeks an award of attorneys' fees from the defendant herein. The Secretary, having previously submitted his statement of facts to the Court, and while having no involvement or direct interest in this proceeding, submits this statement solely for the purpose of apprising the Court of his views, as requested, of certain pertinent provisions, regulations and cases under Title IV of the Labor-Management Reporting & Disclosure Act of 1959 (29 U.S.C. § 401, *et seq.*) which bear upon this issue.

A reading of the provisions of Title IV of the Act (29 U.S.C. § 482 and § 483) reveals that unlike other Titles of this statute, for example Title V, section 501(b) (suit by a member against an officer of a labor organization for breach of fiduciary responsibility), Congress provided for no award of attorneys' fees in Title IV, nor do the regulations issued by the Secretary pursuant to the statute authorize or even discuss such an award of attorneys' fees. This, obviously, because the Congress did not provide for a role under this provision of the statute to private litigants. Rather, as the Supreme Court so aptly pointed out in *Calhoun* v. *Harvey,* 379 U.S. 134 (1964), "it is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interest".

Despite the decision of Congress to preclude private litigants from initiating a lawsuit challenging an election of union officers under Title IV, the Supreme Court, resting on its equity powers and the Federal Rules of Civil Procedure rather than upon any specific language contained in Title IV, held in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972) that limited private intervention in lawsuits brought by the Secretary of Labor would be permitted.

The Supreme Court was careful in its holding in *Trbovich supra,* to sharply delineate the roles of private litigants as opposed to that of the Secretary, the former being permitted only to protect his private interest which the Court pointed out might sometimes be at variance with the position of the Secretary in vindicating the public right.

Since intervention in this case was permitted on the basis of *Trbovich,* we must subsume that the Intervenor sought to protect his private interest.

As to whether an award of attorneys' fees should be allowed by this Court because of any private interest protected by counsel in the course of this litigation would, in our view, be a matter for the Court's discretion to be exercised, if at all, on the basis of the court-created limited right to intervene in Title IV matters under the holding in *Trbovich.*

Respectfully submitted,

/s/ William J. Kilberg,
William J. Kilberg,
Solicitor of Labor,

/s/ Louis Weiner,
Louis Weiner,
Regional Solicitor,

/s/ Stephen K. Ernst,
Stephen K. Ernst,
Attorney,
United States Department of Labor.

/s/ Richard L. Thornburgh,
Richard L. Thornburgh,
United States Attorney,
Attorneys for Plaintiff.

U.S. GOVERNMENT PRINTING OFFICE: 1976